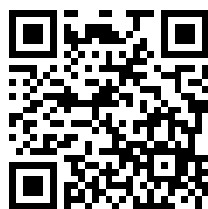

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INSTITUTES
OF
AMERICAN LAW.

BY
JOHN BOUVIER.

New Edition

BY DANIEL A. GLEASON.

In Societate civili, aut lex aut vis valet.—BACON
Ce qui est bien classé, est à moitié su.—DUVAL.

IN TWO VOLUMES.

VOL. I.

PHILADELPHIA:
J. B. LIPPINCOTT & CO.
1882.

Entered, according to Act of Congress, in the year 1851, by
JOHN BOUVIER,
In the Clerk's Office of the District Court of the Eastern District of Pennsylvania.

Entered, according to Act of Congress, in the year 1870, by
ROBERT E. PETERSON,
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TO THE HONORABLE

ROGER B. TANEY, LL.D.

CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES,

This Work

IS, WITH HIS PERMISSION,

MOST RESPECTFULLY DEDICATED,

*AS A TOKEN OF THE GREAT REGARD ENTERTAINED FOR HIS INTEGRITY AS A JUDGE,
HIS LEARNING AS A JURIST, AND HIS VIRTUES AS A MAN*

By the Author.

PREFACE.

IN preparing the present edition of this work, the editor has not had the vanity to suppose that he could improve the general arrangement and classification of subjects. He has endeavored to apprehend thoroughly the plan of the author, and to make such additions only as in the lapse of time have become necessary to fully carry out the original design. The increase in size which would have resulted from this cause, however, rendered an increase of space necessary, which has been gained by placing a complete analysis at the commencement of the work and removing the titles of the various sub-divisions to the head of the chapters into which the books are divided. The very full and accurate list of abbreviations given in Bouvier's Law Dictionary seemed to render the reproduction of such a list here unnecessary. The system of citation of text-books and reports adopted in that work has been adhered to in the present book. By the adoption of a smaller-sized type and a closer arrangement, each page of the new edition is made to contain a much larger amount of matter than the old, without any sacrifice of clearness and convenience. The more perceptible changes are rather in mechanical details than in matters of substance, and have been intended to secure economy of space without loss of convenience in perusal. Such subjects as, from their increasing importance, seemed to demand a fuller consideration than they formerly required, have been more fully developed; and it is hoped that the great aim of the author, that of usefulness to the reader, and especially to students of the science of law, may be more fully secured by the work in its present form.

ADVERTISEMENT TO THE SECOND EDITION.

IN presenting the second edition of the *INSTITUTES OF AMERICAN LAW* to the profession, every effort has been made to render it worthy of the patronage which has already been so liberally bestowed upon it, by correcting every little inaccuracy, and also by supplying an omission which was not noticed by the author until after it was too late to remedy it—"The manner in which easements may be extinguished."

The family of the author would do violence to their feelings did they not return their sincere thanks to the Bench and Bar for the many encomiums which they have been pleased to award the work. To the Hon. Joel Jones they feel much indebted for his kindness in furnishing the head omitted in the first edition.

Hilton, Burlington Co., N. J., 1854.

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PREFACE TO THE FIRST EDITION.

WHENEVER a writer submits a literary work to the public, he tacitly declares that it is his conviction such work deserves to be examined and read, and that it will place the objects of inquiry in a new light; for unless such are the views he entertains, he will not trouble himself to write, nor others to read, what can be of no use. The author has, therefore, no apology to make, nor motive to offer, as an inducement for publishing this work, but the one which has influenced him throughout in the course of his labor, that of being useful. He hopes he has not labored in vain.

Most lawyers have felt the want of a preliminary work to serve the young American student as a guide in the labyrinth of jurisprudence; as an instructor to give him a general view of the several parts of this judicial science; to mark the objects of each, and to point out the natural dependence which unites them; a work tending to establish a method which should be adopted in the study of the law; to point out the numerous links of the chain which unites the ancient with the modern law, which binds the past with the present, and which by its nature must for ever remain indestructible. A work which would thus elevate the science of the law in the sight of youth, and impress a character of unity upon it, would exercise a happy influence on the minds of the students, develop their moral and intellectual faculties, and be a blessing to them.

But it is far less difficult to describe what the legal edifice should be, and to state what is required for its construction, than to select the materials of which it should be composed, and to make such a disposition of them in the building as would render the structure at once solid, elegant, and every way fitted for the purpose for which it is intended.

On entering on his profession, the American student is discouraged by being obliged to study laws which are not his own, and which do not belong to the present age, except as matter of history. It requires an effort to read even the elegant Blackstone, and, when studied, it must be forgotten, because the laws on which that author has so beautifully commented are not the laws which the young aspirant seeks to know—they are not those of his country. It is true, noble efforts have been made by American writers to explain our laws, and to them the profession must be greatly indebted; but the commentaries which have been so liberally bestowed are better adapted to the use of those who are already good lawyers, than to teach one who has every thing to learn.

The author cannot hope to have made a perfect work, and supplied, in this respect, all the deficiencies and the wants of the profession; his aim has been an approximation to what a work should be which might, in some degree, deserve the title of *Institutes of American Law*. He has endeavored to reduce the whole to a strict method, and, by a correct classification, to impress upon the mind of the student the objects of his inquiry; for, "what is well classified is half known." It seemed to him that jurisprudence, as much as any other science, required this method; and while all kinds of human knowledge are now taught in this manner the law should not be an exception.

In the execution of this work the author has spared no pains to classify his materials in the most natural manner; he has not followed any known plan, and it

is possible that, with more talents and knowledge, he might greatly improve upon that which he has adopted. He hopes, however, that with a very full table of contents the reader will be at no great difficulty to comprehend it.

While it has been his constant object to show what the law actually is, he has ventured, not unfrequently, to state what it was, and from what source it flows. Whenever a comparison could be made with advantage, the foreign laws within the reach of the author have been consulted, and their agreement or discord with our own pointed out. He has made free use of the Roman or civil law, whenever he found its principles applicable to our own jurisprudence; and by a frank acknowledgment of the source whence so many just rules flow, he has, as far as in his power, done what he could to avoid the reproachful accusation which some continental writers of Europe have, with perhaps too much truth, charged against the English lawyers, of constantly pillaging the Roman law without ever citing it.¹ If all the principles found in Bracton and Fleta, Fortescue and Blackstone, and in the treatises on commercial law and equity, and many of the judgments of our courts which have been borrowed from that system without giving it credit, were expunged from those authors, their works and judgments would be deprived of their greatest ornaments.

In laying down principles and rules, the author has been careful to give correct definitions, and when these rules are subject to exceptions, he has pointed them out in as clear and simple language as it has been in his power to employ. He has not thought it necessary to extend his researches into all the ramifications of the law, nor his inquiries into details which would confuse the reader without enlightening him; when there have been conflicting decisions a reference has been made to authorities, to enable the student to examine the foundation upon which they rest. He has, however, shown the sources of the law, and traced the stream down its current. His chief aim has been to point out its rules and maxims, as principal landmarks to the student, and to enable him, by keeping a constant eye upon these summits of the law, to pursue his onward course, without ever losing himself; for these rules, "after having inspired the law, still remain with it, and in its midst, in some sort, as the lamp in the sanctuary, enlightening the parts where the law applies, and pointing out those which it cannot reach."

As this is intended as an American work, and for American lawyers, the principal positions laid down have been supported, wherever practicable, by reference to American authorities; and when there has been a difference in the several states of the Union, either in consequence of their statutory provisions or the decisions of their courts, it has been pointed out and explained, whenever the subject was of sufficient importance to require it. Upon an examination, however, it will be found that English precedents have not been overlooked; on the contrary, they have been cited whenever they were important, or when American authorities could not be found applicable to the case.

While it is expected that this work will be useful to the student, it is hoped the practicing lawyer may find it a convenient manual, as a book of reference in practice. To render it useful to this class of readers, the author has spared no pains to make a perfect index, so as to save the time of the practitioner.

PHILADELPHIA, June, 1851.

¹ On reconnait là, et à chaque page, dans Blackstone, le faire habituel des Anglais, qui pillent incessamment le droit romain, et ne le citent jamais. Duval, *Le Droit dans ses Maximes*, p. 24, note.

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INSTITUTES OF AMERICAN LAW.

PRELIMINARY BOOK.

OF LAWS AND GOVERNMENT.

CHAPTER I.

LAW AND SOVEREIGNTY.

- 1-12. Laws in general.
 - 5. Justice.
- 8-12. Laws.
 - 9. Law of nature.
 - 10. Law of nations.
 - 11. Municipal law.
- 13-36. Sovereignty.
 - 13. What is sovereignty.
 - 14. By whom sovereignty is exercised.
 - 15. Division of the powers of sovereignty.
 - 19. What is a constitution.
 - 20. Different forms of government.

1. MAN is a social being, fond of the company of his fellows, and always disposed to live with others. It is thus that families, tribes and nations are formed. Men render to, and receive mutual benefits and assistance from each other. But in such societies there must constantly arise causes of difference among the several members, and these must be adjusted or settled, either by the parties themselves, or by some power which is superior to them. Their rights must also be regulated, so that the parties may know to what each one is entitled. This is done by an actual or presumed agreement of all the members of the society, state or nation, by the establishment of certain rules, which acquire the name of laws. The knowledge of these laws, or the science by which they are understood, is called jurisprudence.

2. The first step to understand this science is, therefore, to know exactly the nature of the laws, and to form of them a definite and precise idea. By *science* is understood a connection of truths, founded on evident principles or on

demonstrations ; a collection of truths of the same kind, arranged in a methodical order, for the purpose of making them more easily understood.

3. In its most extensive sense, the word law signifies a rule of action. It is a rule which all beings, whether animate or inanimate, reasonable or not, must observe. Thus we say the laws of motion, of gravitation, of mechanics, as we say natural laws, political or criminal laws. In this sense all beings have their laws ; the material world, animals and man, each have their laws.¹

The knowledge of all these laws belongs to philosophy, which, in its immensity, embraces all the knowledge which man can acquire by the use of his reason. More circumscribed in its object, jurisprudence regulates only human actions.

4. Law, in this view then, is the rule of human actions ; that is, of those actions which are the result of the free exercise of intelligence and will.

Law is called a rule of action by a metaphor borrowed from mechanics. A rule, in its proper sense, is an instrument, by means of which we draw, from one point to another, the shortest line possible, which is called a straight line. The rule is used in comparison in the arts, in order to judge whether a line is straight, as it is used in law, to judge whether an action is just or unjust.

An action is just or right, when it conforms to the rule, which is the law ; it is unjust when it differs from it ; it is not right. And so it is of our will or intention.

5. *Justice* has been variously defined : it is the constant and perpetual disposition to render to every man his due ;² or, perhaps more correctly, it is a conformity of our actions and wills to the law.³

6. Justice is interior or exterior. The first is the conformity of our will, and the last of our actions to the law. The union of both makes perfect justice. The last is alone the subject of human jurisprudence. Interior justice is the object of morality.

7. In the most extensive sense of the word, justice differs but little from virtue, for it includes within itself the whole circle of virtues. Yet the common distinction between them is this ; that which positively and in itself is called virtue, when considered relatively with respect to others, has the name of justice. But justice being in itself a part of virtue, is confined to things simply good or evil, and consists in a man taking such a proportion of them as he ought.

8. To make a law, there must be a superior, who has authority to make it, and an inferior, who is bound by it. To complete the definition of law, we must say that it is a rule prescribed by a lawful superior.

God is the first great superior. Peace and order in society would not be guaranteed by the principles of human legislation, if those principles were not protected by the salutary influence of true religion. And human laws would be insufficient to regulate the conduct of man, if their action was not supported, directed and supplied by religion ; and morality and religion would of themselves be powerless to insure the peace of society, without the aid of the civil law.

Many moral obligations exist which are not enforced by the civil law, and these are left to the operations of conscience. Such, for example, as gratitude and benevolence.

9. The *law of nature*, or natural law, is that which God, the sovereign of the universe, has prescribed to all men, not by any formal promulgation, but by the dictate of right reason alone. It is ascertained by a just consideration of the agreeableness or disagreeableness of human actions to the nature of man ;

¹ Montesquieu, *Espr. des L.* liv. 1. c. 1.

² Justinian, *Inst.* 2. 1.

³ Toullier, *Dr. Civ. t. prel. n. 5.*

and it comprehends all the duties we owe either to the Supreme Being, to ourselves, or to our neighbors; as, reverence to God, self-defence, temperance, honor to our parents, benevolence to all, a strict adherence to our engagements, gratitude, and the like.

By natural law is also understood the system or collection of those laws arranged together in a methodical order.

The law of nature is superior in obligation to any other. It is binding in all countries and at all times. No human laws are valid if opposed to this, and all which are binding derive their authority either directly or indirectly from it.

10. The *law of nations* is a system of rules, deducible by human reason from the immutable principles of natural justice, and established by universal consent among the civilized nations of the earth, in order to decide all disputes, and to insure the observance of good faith and justice in that intercourse which must frequently occur between them; or it depends upon mutual compacts, treaties, leagues and agreements between separate, free and independent communities.⁴

The law of nations, *jus gentium*, has of late years been called international law.

Nations with regard to each other are considered as individuals, and the law of nations is to regulate the differences which may exist between them in their national capacity. They are in a state of nature, and must be considered as so many free and independent persons living in that state; and, therefore, the rules of natural law are to be applied to them.

International law is generally divided into two branches:—The natural law of nations, consisting of rules of justice applicable to the conduct of states. The positive law of nations, which consists of the voluntary law of nations, derived from the presumed consent of nations, arising out of their general usage; the conventional law of nations, derived from the express consent of nations as individuals, as evidenced in treaties and other international contracts or compacts; the customary law of nations, which is a tacit consent to certain rules which have been observed by them.⁵

The law of nations has been divided by writers into necessary or voluntary, or into absolute and arbitrary; by others into *primary* and *secondary*, which latter has been subdivided into customary and conventional. Another division is made into natural and positive.

The various sources and evidence of the law of nations are the following:—

The rules of conduct deducible by reason from the nature of society existing among independent states, which ought to be observed among nations.⁶

The adjudications of international tribunals, such as prize courts and boards of arbitration.

Text writers of authority.

Ordinances or laws of particular states, prescribing rules of conduct of their commissioned cruisers and prize tribunals.

The history of the wars, negotiations, treaties of peace, and other matters relating to the intercourse of nations.

Treaties of peace, alliance and commerce, declaring, modifying or defining the preëxisting international law.⁷

11. Various definitions have been given of *municipal or civil law*. According to Mr. Justice Blackstone, it is “a rule of civil conduct, prescribed by the supreme power in the state, commanding what is right and prohibiting what is

⁴ Justinian, Inst. 1. 2. 1; Dig. 1. 1. 9.

⁵ Vattel, Dr. des Gens, tit. prel.

⁶ Le Louis, 2 Dodsl. Adm. 249; see Triquet v. Bath, W. Blackst. 471.

⁷ Wheaton, Int. Law, p. 1, c. 1, s. 14.

wrong." This definition has been justly criticised; the latter part has been considered superabundant, and the first too general and indefinite, and too limited in its signification, to convey a just idea of the subject. Mr. Chitty defines it to be "a rule of civil conduct, prescribed by the supreme power in a state, commanding what shall be done and what shall not be done."⁸ But this does not appear to distinguish between a law which may have the form of a judgment and a general law; as, for example, that Primus shall pay Secundus a certain sum of money. Laws should apply to all the citizens.⁹ Civil or municipal law is a rule of conduct prescribed to all the citizens by the supreme power in the state, in conformity to the constitution, on a matter of common interest. It is the solemn declaration of the legislative power, by which it commands, under certain penalties or certain rewards, what each citizen should do, not do, or suffer, for the common good of the state.

In order fully to comprehend the subject, let us consider the several parts of this definition.

It being the civil law, it of course prescribes rules of civil conduct only. This distinguishes it from the moral law, which is regulated by the law of nature or the revealed law.

It is a *rule*, because it is the standard of what the law deems right and proper. It is also called a *rule*, to distinguish it from advice or counsel, which may be given even by an inferior; and the law is a precept which all are bound to obey.

The law is a *rule of conduct*. It is to regulate the actions of men. The law regards man as a citizen, who is bound to perform certain duties to his neighbor.

It must be *prescribed*, for, until it is made known, it has no binding authority. But if promulgated according to the rules established in such cases, it is binding, although it may be unknown. Laws are generally binding from their passage, that being a sufficient publication, but sometimes they are to take effect only from some time named. In general they are published in books and newspapers, by authority of the government, for the information of the people.

The law must be prescribed to *all the citizens*. It is not a transitory order relating to an individual or to a particular object; it is a permanent, uniform rule, prescribed as to an object of general utility and of a common interest. The law considers the citizens in mass. It cannot apply to an individual, nor to a particular action, nor to a particular case. It is equal for all, whether it protects or punishes. All men are equal before the law. It is the constant practice of the national and state legislatures, however, to pass what are called private acts, such as to authorize the sale of lands, and a variety of other things; but these cannot, with any propriety, be called rules of conduct.

Laws must be made in a solemn manner by the sovereign authority, or by the *supreme power in the state*. They derive their binding force from this power alone. But it frequently happens that the power of making laws is delegated to other bodies, by those which derive their authority from the constitution. Municipal and other corporations make ordinances or laws, which have a binding force though they derive their power wholly from the legislature. In a late case it was held that a law passed by the legislature, which required the sanction of the people at an election, was unconstitutional.¹⁰

The law must be made in *conformity with the requirements of the constitution*. If the forms prescribed by the constitution have not been observed, or the

⁸ 1 Blackst. Comm. 44, n. 6, Chitty ed.

⁹ 1 Sharswood, Blackst. Comm. 44.

¹⁰ Parker v. Commonwealth, 6 Penn. St. 507.

power have not been delegated to the legislative body, the act is unconstitutional and void.¹¹

The law must have an object of *common interest to all*. It differs from orders or commands given by a legitimate authority, although they may be obligatory, because the law authorizes their execution. It differs also from judgments, which must always be given as to past actions, whereas the law provides only for the future.

12. Having shown that law is a rule prescribed by the supreme power or sovereignty of the state, and that it is a solemn declaration of the legislative power, it will be proper to inquire what is the sovereignty; what is the government of the United States; how laws are made, and how many kinds there are. These will be considered separately.

13. In treating of sovereignty we shall consider what sovereignty is; by whom it is to be exercised; how it is divided; what is the constitution of a state; of the different forms of government.

Sovereignty is that public authority which has no superior, and which commands in an independent civil society, which orders and directs what each must do, to acquire its ends. It is the union of all the powers; it is the power to do any and every thing in a state, without being accountable to any one; to make laws and execute them; to coin money; to impose and levy contributions; to declare war, or to make peace; to form treaties with foreign nations, etc.

14. Abstractly, sovereignty belongs to the people, and resides essentially in the body of the nation. But the nation, from whom emanate all the powers, can exercise them only by delegation. Sovereignty cannot be exercised otherwise, except in small republics.

15. If we analyze sovereignty, we find it composed of three powers, namely, the legislative, the executive, and the judiciary.

16. The first, is the power to make new laws; to correct, repeal, or abrogate the old.

17. The second, is the power to cause those laws to be executed or obeyed. This power is usually exercised by a single individual, known by the names of president, governor, emperor, king, etc.

18. The third, is the power to apply the law to particular facts; to judge of differences which arise among the citizens or inhabitants of the state, and to punish crimes. This is vested in courts of justice.

19. A *constitution* is the fundamental law of the state, containing the principles upon which the government is founded, and regulating the division of the sovereign powers, directing to what persons each of these powers is to be confided, and the manner in which it is to be exercised.

The constitution is made by the authority of the people themselves, or their delegates specially authorized, and it can be changed only by the like power. The legislature, which is the creature of the constitution, cannot make any change in such fundamental law.

20. *Government* is the manner in which sovereignty is exercised in the state. It is the means adopted to put the fundamental law of the state in action. It is the function and the very end of the government to apply this fundamental law for the happiness and advantage of all the citizens; for the constitution of the state is the lawful expression of the wants and of the will of all. Hence follows this necessary consequence, that the government is the delegate of society, the state, or the nation. The people, being sovereign, may adopt any of the forms of government which have been devised among men.

21. There have been at all times, and there are now, different form of

¹¹ *Commonwealth v. Mann*, 5 Watts & S. Penn., 403, 419.

government, the three principal of which are democracy, aristocracy, and monarchy. But these different forms are combined and subdivided to infinity. From the African prince, who disposes freely of the lives and properties of his subjects, to the European monarch, whose power is contained within much narrower bounds; from the savage cacique, who governs his tribe because he is the oldest man in it, to the republican magistrate who is elected by the free suffrage of his fellow-citizens, we perceive an infinity of organic combinations.

22. When the sovereign power is exercised by the people in a body, or by a majority of the people, the government is called a *democracy*. In this form of government all men are equal in a political and civil point of view. Democracy is the complete triumph of the principle of equality. All the citizens must have an equality of rights and not merely of privileges.

23. When the sovereign power is exercised by a small number of persons, in their own right, exclusively from the rest of the people, this form of government is called an *aristocracy*. In an aristocratic country the rulers claim the power to govern in their own right, and not by delegation, as in a representative democracy. Aristocracy and slavery spring from the same root. The first is the parent of the second, for the master and slave appeared on the same day.

24. When the sovereign power is concentrated in the hands of a single magistrate, the government is a *monarchy*, whether it bear the name of an empire, a kingdom, a duchy, or any other.

25. But the sovereign power may be divided and combined in a thousand different ways; hence result *mixed governments*, such as are most of those of civilized nations. Indeed, it may with truth be observed that the constitution of each state, consisting in the manner in which the powers of sovereignty are divided, seldom remains the same for any great length of time. Its form varies more frequently than would strike one at first blush, in consequence of the encroachments which are insensibly made by one branch of the government upon the others. There are, besides these principal forms, a variety of governments, which will here be defined.

26. *Theocracy* is a government where the clergy exercise the sovereign power, under a pretence that it is the government of God, and under his immediate direction.¹²

27. *Ochlocracy* is a government where the authority is in the hands of the multitude; it is the abuse of a democracy.¹³

28. *Oligarchy* is a government where the sovereign authority has been usurped by a few men, when such power ought to reside in the people.

29. *Demagogy* is the exaggeration and abuse of democracy, and is a violation of the principle of the sovereignty of the people. Demagogy exists when a government nominally a democracy is really in the hands of a few (demagogues), who hold their power by an appeal to the passions and prejudices of the multitude.

30. *Polyarchy* is that form of government in which the authority is confided to several persons; as, for example, the Directory and the Consulate, and the Provisional Government of France. Another example may be given where two brothers, the sons of a king, succeed to the throne and reign jointly.

31. A *representative democracy* is a government where the powers of sovereignty are delegated to a body of men, elected from time to time, who exercise them for the benefit of the whole nation. Such is the general government of the United States, and of the several states of the American Union.

32. *Despotism* is the state where the powers of the government are not

¹² Matter, De l'influence des mœurs sur les lois, et de l'influence des lois sur les mœurs, 189.

¹³ Vaumène, Dict. du Langage Politique.

divided, but united in the hands of a single man, whatever may be the title he bears, emperor, king, sultan, president, etc. Where the power of such man is not limited by law, he may, having only his will for a rule, make or repeal laws, execute them or not, at his pleasure, etc. This is not properly a form of government. Despotism is an act of tyranny.

By *tyranny* is understood the violation of the laws which regulate the exercise of the powers of sovereignty, and by tyrant the chief of the state, who, although he may be legitimate, violates them for the purpose of committing arbitrary acts contrary to justice.

The terms tyrant and usurper are often confounded, because usurpers are almost always tyrants. But these terms are very different. Even a legitimate ruler may become a tyrant, if he governs in an unjust and despotic manner; and a usurper may cease to be a tyrant by governing according to justice.

33. A *commonwealth* is that form of government in which the administration of public affairs is open or common to all persons, without any special regard to rank or property, as distinguished from monarchy or aristocracy.

34. A *republic*, which is another name for commonwealth, is that form of government in which the administration of affairs is open to all the citizens. In another sense the term republic, *res publica*, signifies the state independently of its form of government.

35. A *hierarchy* signified originally *power of the priests*, for, in the beginning of societies, the priests were entrusted with all the power; but among the priests themselves there were different degrees of power and authority, at the summit of which was the sovereign pontiff, and this was called the hierarchy. Now it signifies not so much power of the priest, as order of power.

36. *Stratocracy* is a military government. This word is derived from two Greek words signifying army and power.

CHAPTER II.

THE GOVERNMENT OF THE UNITED STATES.

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- 72. The judicial power.
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37. In this chapter we shall consider the history of the formation of the government of the United States ; by whom the sovereignty is exercised ; in whom the government is vested by the constitution ; and the government of the several states.

The government of Great Britain had obtained a footing on the American continent by right of discovery, and in 1620 had established two colonies, namely, Virginia and Massachusetts, and from that period until the year 1732, other colonies were established along the eastern shore of the continent. These were governed in various modes ; they had provincial, proprietary, and charter governments ; but they did not essentially differ from each other. The people

were all subjects of the mother country, and under the same general government. They had all brought and adopted the laws of England, which were suitable to their condition, but they were independent of each other. Each colony had its own legislature, and they were all dependent colonies and not independent states; consequently they could make no laws repugnant to the acts of the parliament of England or of Great Britain; and the mother country assumed the right of binding the colonies, in all cases, by acts of parliament. This soon produced the most resolute denial, on the part of the colonies, who claimed that taxation and representation should be inseparable, and, as they were not represented in the British parliament, they insisted that no taxes could be imposed upon them by the laws of Great Britain, and they prepared to resist such acts of oppression. Before this period the colonies had found it necessary to unite together, to repress the hostilities of the French and Indians. For this purpose they had assembled at various periods. As soon as they resolved to oppose these tyrannical acts of Great Britain they formed a revolutionary league, and, in 1774, the people of the colonies elected delegates to represent them in a general assembly, which met in Philadelphia, and assumed the name of the Continental Congress. This was the commencement of that union which has made our country the admiration of the whole world.

The colonies which were represented in this congress were thirteen in number, namely: New Hampshire, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia.

On the fourth day of July, 1776, the Continental Congress adopted the celebrated Declaration of Independence, which severed the tie between Great Britain and her colonies, and the latter became free and independent states. In this memorable instrument are portrayed, in nervous language, the various acts of tyranny of Great Britain, a firm reliance upon God, and an unswerving determination to support the rights of the American people.

By the dissolution of the relations which existed between the colonies and the mother country, the former were left with no other than their local governments. A common sense of danger, in this situation, induced the new states to adopt that form of government, which is contained in the *Articles of Confederation*. This instrument obtained its full force in 1781, but owing to its inefficiency, it was found not to answer the purpose for which it was intended.

To remedy the evils attendant upon the weakness of the *Articles of Confederation*, delegates were appointed by the legislatures of all the states, except Rhode Island, who assembled in Philadelphia in May, 1787, with power to amend the *Articles of Confederation*. It was soon found impracticable to amend them, and it was resolved to form a new instrument, which resulted in the Constitution of the United States, which was unanimously adopted by the Convention on the 17th day of September, 1787. After much consideration, the legislatures of all the states ratified the constitution, and it went into full operation on the fourth day of March, seventeen hundred and eighty-nine.¹ A number of amendments have since been made in the constitution, and ratified by the requisite number of the states.

38. By the Declaration of Independence, and the acknowledgment of Great Britain that the United States of America are and were free and independent states, they became a nation.

39. In its original signification the word *nation* denoted those of the same origin, who were natives of the same race, although they might live in different countries; as, for example, the Jewish nation; and the union of the several tribes

¹ *Owings v. Speed*, 5 Wheat. 420.

of the Greeks, although they composed several states, made but one nation. In this sense the Romans understood this term, for they had but one word, *gens*, to represent race and nation. But considered in a more limited sense, the word nation indicates a social form, in which a certain number of towns, or particular states, whether of the same race or origin or not, obey a law common to them all and the same government. A nation is, therefore, an independent body politic; a society of men united together for the purpose of promoting their mutual safety and advantage by their joint efforts and their combined strength. Such a nation becomes a moral person, and is susceptible of obligations and rights.²

In considering the people of the United States they may be classed as follows: those born in the country and those born out of it.

40. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state where they reside.³

Citizenship does not now depend upon color or race, though in some states the right of suffrage is confined to white persons.

The aborigines or persons of the Indian race, are not in general citizens of the United States, and can exert no political rights. The tribes are regarded as separate political communities, and the individuals are not subject to the jurisdiction of the United States.

Children of foreign ambassadors, although born in the United States, are not citizens, being aliens, as their fathers were at the time of their birth.

Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.⁴

41. Like those born within the United States, persons born out of their territory, are entitled to different rights; some are citizens and others are not.

Persons born out of the United States who are children of citizens of the United States, or of persons who have been such, are citizens, provided the father of such children shall have resided within the same.⁵

Persons who were in the country at the time of the adoption of the Constitution, have the rights of citizens.

Persons who became naturalized under the laws of any state before the passage of any law on the subject of naturalization by Congress, or who have become naturalized under the acts of Congress, are citizens of the United States, and, like other citizens, are entitled to vote for all officers who are elected by citizens, and to hold any office except those of president and vice-president of the United States.

Children of naturalized citizens, who were under the age of twenty-one years at the time of their parents' being so naturalized or admitted to the rights of citizenship, are, if then living in the United States, considered as citizens, and entitled to the same rights as their respective fathers.⁶

Persons who resided in a territory which was annexed to the United States by treaty, and the territory afterward became a state of the Union,—as, for example, a person who, born in France, moved to Louisiana in 1806, settled there, and remained in the territory till it was admitted as a state,—was held to be a citizen of the United States, although not naturalized under the acts of congress.⁷

Aliens and foreigners, who have never been naturalized, are not citizens of the United States, and have no political rights whatever.

42. The constitution vests the legislative power in Congress; the executive

² Vattel, *Dr. des Gens*, t. prel. s. 1, 2; *Cherokee Nation v. Georgia*, 5 Pet. 52.

³ U.S. Const. amend. 14, s. 1.

⁴ U.S. Const. amend. 13, s. 1.

⁵ Act of Cong. Apr. 14, 1802, s. 4, 2 Stat. 153; Act of Feb. 10, 1855, s. 1, 10 Stat. 604.

⁶ Act of Apr. 14, 1802, s. 4, 2 Stat. 153.

⁷ *Desbois' case*, 2 Mart. La. 185.

in the President of the United States ; and the judicial power in certain courts and tribunals. These will be separately considered.

43. All *legislative power* granted by the constitution is vested in a Congress of the United States, which consists of a senate and house of representatives.⁸

The congress shall assemble at least once in every year, and such meeting shall be on the first Monday of December, unless they shall by law appoint a different day.⁹

Each house is judge of the elections, returns and qualifications of its own members ; and a majority of each constitutes a quorum to do business ; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner, and under such penalties, as each house may provide.

Each house may determine the rules of its proceedings, punish its members for disorderly behavior, and with the concurrence of two-thirds, expel a member.

Each house must keep a journal of its proceedings, and from time to time publish the same, except such parts as may, in their judgment, require secrecy ; and the yeas and nays of the members of either house on any question must, at the desire of one-fifth of those present, be entered on the journal.

Neither house, during the session of congress, can, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two houses shall be sitting.¹⁰

The senators and representatives are to receive a compensation for their services, to be ascertained by law, and paid out of the treasury of the United States. They are, in all cases, except treason, felony, and breach of the peace, privileged from arrest during their attendance at the session of their respective houses, and in going to or returning from the same ; and for any speech or debate in either house, they cannot be questioned in any other place.¹¹

No senator or representative can, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which has been created, or the emoluments whereof have been increased, during such time ; and no person holding any office under the United States, can be a member of either house during his continuance in office.¹²

By section 8, article 1, the congress shall have power—

To lay and collect taxes, duties, imposts, and excises ; to pay the debts and provide for the common defence and general welfare of the United States ; but all duties, imposts and excises, shall be uniform throughout the United States :

To borrow money on the credit of the United States :

To regulate commerce with foreign nations and among the several states, and with the Indian tribes :

To establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies, throughout the United States :

To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures :

To provide for the punishment of counterfeiting the securities and current coin of the United States :

To establish post-offices and post-roads :

To promote the progress of science and useful arts, by securing for limited

⁸ U. S. Const. art. 1, s. 1.

⁹ U. S. Const. art. 1, s. 4. By act of congress Jan. 22, 1867, ch. 10, it is provided that in addition to the regular times of meeting of congress there shall be a meeting of the fortieth congress and of each succeeding congress on the fourth day of March, the day on which the term begins, for which the congress is elected.

¹⁰ U. S. Const. art. 1, s. 5.

¹¹ U. S. Const. art. 1, s. 6.

¹² U. S. Const. art. 1, s. 6.

times, to authors and inventors, the exclusive right to their respective writings and discoveries :

To constitute tribunals inferior to the supreme court :

To define and punish piracies and felonies committed on the high seas, and offences against the law of nations :

To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water :

To raise and support armies ; but no appropriation of money to that use shall be for a longer term than two years :

To provide and maintain a navy :

To make rules for the government and regulation of the land and naval forces :

To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions :

To provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively the appointment of the officers, and the authority of training the militia, according to the discipline prescribed by congress :

To exercise exclusive legislation, in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of congress, become the seat of government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings: And,

To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof.

The senate and house of representatives will be separately considered.

44. In considering the senate let us inquire, into the number of senators; by whom they are elected; into their qualifications; the time of their election; the duration of their office; their powers.

The *senate* is composed of two members from each state, who are called senators.¹³ This is fixed without any regard to the number of inhabitants in the respective states; the senators represent the states rather than the people. The vice-president of the United States is president of the senate.

45. The senators are chosen by the legislature of each state,¹⁴ and, in cases of vacancies, they are appointed by the executive of the state, and are then to serve until the next meeting of the legislature, which shall then fill such vacancies.¹⁵

46. No person can be a senator who shall not have attained the age of thirty years, and been nine years a citizen of the United States, and who is not, when elected, an inhabitant of that state for which he is chosen.¹⁶

No person can be a senator, who having previously taken an oath, as a member of congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the United States, has engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But congress may, by a vote of two-thirds of each house, remove such disability.¹⁷

47. After the first election of senators, under the constitution, they were divided, according to its requisition, into three classes. The seats of the first

¹³ U. S. Const. art. 1, s. 3.

¹⁵ U. S. Const. art. 1, s. 3.

¹⁴ U. S. Const. art. 1, s. 3.

¹⁶ U. S. Const. art. 1, s. 3.

¹⁷ U. S. Const. amend. 14, s. 3.

class were vacated at the expiration of the second year; the second class at the expiration of the fourth year; and the third class at the expiration of the sixth year; so that one-third may be chosen at the expiration of every second year.¹⁸

48. The senators are chosen and hold their office for the term of six years.

49. In their deliberations and all their acts each senator has the right to speak and give his opinion, and they vote not by states, but each senator has a vote. The vice-president has no vote except when the senate are equally divided, when he gives the casting vote.

The senate act in three distinct capacities, and to this body are delegated legislative power, executive authority, and judicial functions. A short view will be taken of each of these.

50. No law can be made without the concurrence of the senate. A majority of the senate constitutes a quorum; this majority relates not to the states, but to the members of the senate.

51. By the constitution the president has power, by and with the advice and consent of the senate, to make treaties, provided two-thirds of the senators present concur.¹⁹

Till the treaty has been completed by the president, or the agents of the United States under his direction, and foreign powers, the senate take no part in the matter. It is then submitted to the senate, and in their deliberations the president takes no part, but he gives them, when required, such information relative to it as they may want. The senate may ratify it in whole or in part, or reject the whole; or they may recommend additional articles, or modify those which have been agreed upon. In such case the treaty is again the subject of negotiation with foreign powers, if the president approve of such alterations or additions.

The senate must give their concurrence to the appointment of certain officers before they can be appointed. The constitution provides that the president shall nominate, and by and with the consent of the senate, shall appoint public ambassadors, other public ministers and consuls, judges of the supreme court and other officers of the United States, whose appointments are not therein provided for, and which shall be established by law; but the congress may by law vest the appointment of such inferior officers as they think proper in the president alone, in the courts of law, or in the heads of departments.²⁰

The proceedings of the senate, while acting on executive business, are with closed doors, and such proceedings are kept secret until the senate remove the restriction.

52. Whenever an officer of the government is impeached by the house of representatives, such impeachment is to be tried by the senate. The constitution directs that the senate shall have the sole power of trying impeachments. When sitting for that purpose the senators must be on oath or affirmation. When the president of the United States is tried, the chief justice presides; and no person can be convicted without the concurrence of two-thirds of the members present.²¹

53. The same order will be observed in considering the house of representatives which has been adopted with regard to the senate.

¹⁸ U. S. Const. art. 1, s. 3.

¹⁹ U. S. Const. art. 2, s. 2, n. 2. The treaty of Paris, in 1803, for the purchase of Louisiana, settled practically the power of the president and senate to annex new territory by treaty; and this power has been exercised since. In 1868, upon the purchase of Russian America, it was urged in the house of representatives that the concurrence of that house was requisite to a treaty involving the payment of money, and the necessary appropriation was made with a protest against its being regarded as a precedent. Act of July 27, 1868, 15 Stat. 198.

²⁰ U. S. Const. art. 2, s. 2, n. 2.

²¹ U. S. Const. art. 1, s. 3, n. 6.

54. Representatives are apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for president and vice-president of the United States, representatives in congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein must be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.²²

The actual enumeration is to be made within three years after the first meeting of the congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of representatives must not exceed one for every thirty thousand, but each state must have at least one representative.²³

55. Representatives elected by the people of the several states, and the electors in each state, must have the qualifications requisite for electors of the most numerous branch of the state legislature.²⁴

56. No person can be a representative who has not attained the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state in which he shall be chosen.²⁵

57. They are elected every second year. When vacancies happen in the representation from any state, the executive authority thereof shall issue writs of election to fill such vacancies.²⁶

58. Representatives are chosen and hold their office for the term of two years.

59. The most important of the functions of representatives is that of legislation, but they have also a power somewhat similar to that of the grand jury. In all cases, each member has one vote. One of their members is elected speaker or president of the house, who, with the rest, has a right to vote. No law can be passed without the concurrence of the house of representatives.

The house has the exclusive right to originate bills for raising revenue; but the senate may propose or concur with amendments, as on other bills.

It shall choose its speaker and other officers; and shall have the sole power of impeachment.

60. The executive power is vested in a President of the United States. It will be proper to consider by whom he is elected; his qualifications; the time of his election; the duration of his office; his power and duties; of the vice-president.

61. Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of senators and representatives to which the state may be entitled in the congress; but no senator or

²² U. S. Const. amend. 14, s. 2.

²³ U. S. Const. art. 1, s. 2, n. 3.

²⁴ U. S. Const. art. 1, s. 2, n. 1.

²⁵ U. S. Const. art. 1, s. 2, n. 2. The fourteenth amendment adds the same qualifications as in the case of senators; see before **46**.

The house of representatives have frequently decided that the states cannot superadd any qualifications to those prescribed by the constitution. Any act of a state legislature attempting to do this as by prescribing that a representative shall reside in the district for which he is elected, will be treated as void. Case of McCreery, Clark & H. Cont. Elect. 203; cases of Trumbull and Marshall, Cong. Globe. 34 Congr. part 1, pp. 547 et seq.; case of Pinkney, Wheaton, 1 Life of Pinkney, p. 7; Story, Const. 625-629; 1 Kent, Comm. 229.

²⁶ U. S. Const. art. 1, s. 2, n. 1, 4.

representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.²⁷

The electors shall meet in their respective states, and vote by ballot for president and vice-president, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the persons voted for as president, and in distinct ballots the persons voted for as vice-president; and they shall make distinct lists of all persons voted for as president, and of all persons voted for as vice-president, and of the number of votes for each; which lists they shall sign and certify, and transmit sealed to the seat of government of the United States, directed to the president of the senate. The president of the senate shall, in the presence of the senate and house of representatives, open all the certificates, and the votes shall then be counted; the person having the greatest number of votes for president shall be president, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest number, not exceeding three, on the list of those voted for as president, the house of representatives shall choose immediately, by ballot, the president. But, in choosing the president, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the house of representatives shall not choose a president whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the vice-president shall act as president, as in the case of the death or other constitutional disability of the president.²⁸

62. No person except a natural born citizen, or a citizen of the United States at the time of the adoption of this constitution, is eligible to the office of president; neither is any person eligible to that office who has not attained the age of thirty-five years, and been fourteen years a resident within the United States.²⁹

63. The president holds his office for the term of four years.³⁰

His duties commence the fourth day of March next after his election.³¹

64. The congress may determine the time of choosing the electors, and the day on which they shall give their votes; which shall be the same throughout the United States.³²

By virtue of this clause in the constitution, congress passed an act declaring that the electors shall be appointed in each state on the Tuesday next after the first Monday in the month of November³³ in every fourth year succeeding the last election of president, according to the apportionment of the representatives and senators then existing. The electors chosen are required to meet and give their votes on the first Wednesday of December, at such place in each state as shall be directed by the legislature thereof.³⁴

In case of the removal of the president from office, or of his death, resignation, or inability to discharge the powers and duties of said office, the same devolves on the vice-president; and the congress may by law provide for the case of removal, death, resignation, or inability, both of the president and vice-

²⁷ U. S. Const. art. 2, s. 1, n. 2. No person shall be an elector who is under the disability mentioned in the fourteenth amendment, section 3. See before 46.

²⁸ U. S. Const. amend. 12, n. 1.

²⁹ U. S. Const. art. 2, s. 1, n. 5. See also amend. 14, s. 3, before, 46.

³⁰ U. S. Const. art. 2, s. 1, n. 1.

³¹ Act of congr. March 1, 1792, s. 12, 1 stat. 239.

³² U. S. Const. art. 2, s. 1, n. 4.

³³ Act of congr. Jan. 23, 1845, s. 1; 5 stat. 721.

³⁴ Act of congr. March 1, 1792, s. 2; 1 stat. 239.

president, declaring what officer shall then act as president, and such officer shall act accordingly, until the disability be removed, or a president shall be elected.³⁵

65. The powers and duties of the president may be conveniently classed into those cases where he exercises the power alone; he exercises it in connection with congress; and he exercises it in concurrence with the senate.

66. He is commander-in-chief of the army of the United States, and of the militia of the several states when called into the actual service of the United States.³⁶

He has power to grant reprieves and pardons for offences against the United States, except in cases of impeachment.³⁷

He may nominate, and by and with the advice of the senate appoint all officers of the United States whose appointments are not otherwise provided for by the constitution, and which shall be established by law; but the congress may by law vest the appointment of such inferior officers as they think proper in the president alone, in the courts of law, or in the heads of departments.³⁸

He has power to fill up all vacancies that may happen during the recess of the senate, by granting commissions which shall expire at the end of their next session.³⁹

He may require the opinion, in writing, of the principal officers in each of the executive departments, upon any subject relative to the duties of their respective offices.⁴⁰

He shall, from time to time, give to the congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both houses, or either of them, and in case of disagreement between them with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive ambassadors, and other public ministers; he shall take care that the laws be faithfully executed; and shall commission all the officers of the United States.⁴¹

67. The president has a negative on all laws passed by congress. This will be considered in another place.

68. The power which he exercises in concurrence with the senate relates either to the treaty making power, or to appointment to office.

69. In making treaties with foreign nations the president acts, in the first place, independently and alone. When made abroad, the treaty is made through the medium of our ministers to foreign courts, under the instructions of the president. When made in this country, the secretary of state takes the place of our minister abroad, and under like instructions. Until the treaty has been agreed upon, the senate is not consulted. When it has been agreed upon, it is submitted to the senate for their concurrence. Here it is either approved of, rejected, or amended. When amendments take place, if the president approves of the same, the treaty again becomes the subject of negotiation with the foreign power, and after it has been modified it is again brought before the senate, for its final ratification.

70. The president has power, by and with the advice and consent of the senate, to make treaties, provided two-thirds of the senators present concur;

³⁵ U.S. Const. art. 2, s. 1, n. 6. In this case the president of the senate *pro tempore*, or if there is none, then the speaker of the house of representatives shall act as president. A new election shall take place the next December or the next but one, if there is not time for two months notice. The new president holds his office for four years from the March next after his election. Act of congr. March 1, 1792, sec. 9-11; 1 stat 239.

³⁶ U. S. Const. art. 2, s. 2, n. 1.

³⁸ U. S. Const. art. 2, s. 2, n. 2.

⁴⁰ U. S. Const. art. 2, s. 2, n. 1.

³⁷ U.S. Const. art. 2, s. 2, n. 1.

³⁹ U.S. Const. art. 2, s. 2, n. 3.

⁴¹ U.S. Const. art 2, s. 3.

and he nominates, and by and with the advice and consent of the senate, appoints ambassadors, other public ministers and consuls, judges of the supreme court, and all other officers of the United States, whose appointment is not therein otherwise provided for, and which shall be established by law. But congress may, by law, vest the appointment of such inferior officers as they think proper, in the president alone, in the courts of law, or in the heads of departments.

The president has power to fill up all vacancies that may happen during the recess of the senate, by granting commissions which expire at the end of their next session.⁴³

71. The vice-president is chosen by the same electors, and at the same time, that the president is elected. The person having the greatest number of votes as vice-president, shall be the vice-president, if such number be a majority of the whole number of electors appointed; and if no person have a majority, then from the two highest numbers on the list the senate shall choose the vice-president; a quorum for the purpose shall consist of two-thirds of the whole number of senators, and a majority of the whole number shall be necessary to a choice.⁴⁴

But no person constitutionally ineligible to the office of president, shall be eligible to that of vice-president of the United States.⁴⁵

72. The judicial power will be considered hereafter.

73. The several states of the Union have power to legislate on all matters within their territorial jurisdiction, except where the power has been delegated to congress, or they are forbidden by the constitution of the United States, or of their own state.

74. By the tenth section of the first article of the constitution of the United it is provided that—

No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make any thing but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts; or grant any title of nobility.

No state shall, without the consent of the congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts laid by any state on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the congress. No state shall, without the consent of congress, lay any duty on tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another state or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

75. The *governments of the several states* are formed very much upon the model of the general government. They are all of a republican form. The constitution of the United States provides that "the United States shall guarantee to every state in this Union a republican form of government, and shall protect each of them against invasion, and on application of the legislature, or of the executive, (when the legislature cannot be convened,) against domestic violence."⁴⁶

76. The *executive power* of each state is vested in a governor, elected either

⁴³ U. S. Const. art. 2, s. 2, n. 2.

⁴⁴ U. S. Const. amend. 12, n. 3.

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⁴⁵ U. S. Const. amend. 12, n. 3.

⁴⁶ U. S. Const. art. 4, s. 4.

by the people or the legislature, who is entrusted with more or less power, and the duration of whose office varies generally from one to three years.

77. The *legislative power* is vested in a general assembly, composed of two branches, generally known by the names of senate and house of representatives.

78. The *judicial power* is, in general, vested in justices of the peace, courts of common pleas, courts of equity, criminal courts, and a supreme court. These have jurisdiction within the limits of their respective states, and over subject matters made cognizable by the state laws.

CHAPTER III.

OF THE PASSAGE, PUBLICATION, AND EFFECT OF LAWS.

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79. The ordinary mode of passing laws is briefly this: one day's notice of a motion for leave to bring in a bill, in cases of a general nature, is required; every bill must have three readings before it is passed, and these readings must be on different days; and no bill can be committed and amended until it has been twice read. In the house of representatives bills, after being twice read, are committed to a committee of the whole house, when a chairman is

appointed by the speaker to preside over the committee; the speaker leaves the chair, and takes a part in the debate as an ordinary member.

When a bill has passed one house, it is transmitted to the other, and goes through a similar form, though in the senate there is less formality, and bills are often committed to a select committee, chosen by ballot. If a bill be altered or amended in the house to which it is transmitted, it is then returned to the house in which it originated, and if the two houses cannot agree, they appoint a committee to confer on the subject.

When a bill is engrossed, and has received the sanction of both houses, it is sent to the president for his approbation. If he approves of the bill, he signs it. If he does not, it is returned, with his objections, to the house in which it originated, and that house enters the objections at large on their journal, and proceeds to re-consider it. If, after such re-consideration, two-thirds of the house agree to pass the bill, it is sent, together with the objections, to the other house, by which it is likewise re-considered, and if approved by two-thirds of that house, it becomes a law. But in all such cases, the votes of both houses are determined by yeas and nays; and the names of the persons voting for and against the bill are to be entered on the journal of each house respectively.

If any bill shall not be returned by the president within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the congress, by their adjournment, prevent its return; in which case it shall not be a law.¹

80. In order to make a law binding it must be made known: to punish a man for the violation of a law he could not know, would be tyrannical, and yet in some cases this has happened.² In cases of this kind a pardon is easily obtained.

The order given by the executive to cause a law to be executed and to make it public, is called its *promulgation*. In the United States this, in general, is not required.

The *publication* of a law is the act of making it public. The passage of a law is a sufficient publication of it to make it obligatory, and unless another time is fixed in the statute, it commences its binding operation from the time of its date.³

In order to make known the laws of congress, that body by an act has provided that the laws should be published in the newspapers in every part of the Union.

When no time is fixed, a law takes effect from its date, that is the day on which it is approved by the executive.⁴ The statutes of some of the states provide that laws shall take effect at a certain fixed period after their passage.⁵

81. Having shown what is the law, how it is made, how it is published and how it becomes binding, it will be proper now to point out its effects, who are bound by it, and who are charged with its execution.

The law commands, forbids, permits and punishes: *leges virtus hæc est imperare, vetare, permittre, punire*.⁶

The *sanction* of the law, then, is the punishment or reward, the good or evil which follows its observance, or the violation of its precepts, or the doing what it forbids. In another sense, the sanction of the law is that part

¹ U. S. Const. art. 1, s. 7.

² The Ann, 1 Gall. C. C. 62; Bank of Mobile v. Murphy, 8 Ala. 119.

³ Matthews v. Zane, 7 Wheat. 164; The Ann, 1 Gall. C. C. 62; Smets v. Weathersbee, R. M. Charlt. Ga. 537; State v. Click, 2 Ala. 26; Goodsell v. Boynton, 2 Ill. 555; Bank of Mobile v. Murphy, 8 Ala. 119.

⁴ Matthews v. Zane, 7 Wheat. 164; The Ann, 1 Gall. C. C. 62.

⁵ 1 N. Y. Rev. St. 157, s. 12; Mass. Gen. St. ch. 3, s. 6; Mich. Const. art. 4. s. 20.

⁶ Dig. 1. 3. 7.

which imposes a punishment, or bestows a recompense or reward, for a certain action.

The sanction of natural law is to be found, first, in religion, which teaches the immortality of the soul, and a future state of rewards and punishments; secondly, in the public esteem, which a good man enjoys; thirdly, in the delicious sentiment of a pure conscience; in the happiness which is enjoyed internally by the man who has nothing to reproach himself with, and who has observed the dictates of the law; in the remorse which is felt by him who has violated all laws, and whose bosom is lacerated with vain regrets, and with pain from which he cannot fly: in the infamy and shame with which he is covered even in his own eyes, although he may have succeeded in concealing his turpitude from the public view.

Human laws give a stronger sanction to the precepts of natural law, as well as to the positive precepts which they have added to them. For this purpose they authorize the employment of the public force to compel every citizen to obey them. And they have carried their foresight further, by imposing punishments against their violators, and these are proportioned to the importance of each crime or misdemeanor.

The reparation in damages caused by an action forbidden in law, is also a kind of sanction.

Not unfrequently a special sanction is provided for in the law, which declares acts null which are contrary to its precepts or prohibitions. But all acts are not null which are forbidden by law. No system of legislation can, perhaps, be found in which all such acts are void. This would, in many cases, produce injustice, and the distinction has been made between those statutes which provide that contracts violating them shall be void, and those which do not so direct.⁷

For example, a clergyman is forbidden to marry minors; he marries them, and by that act subjects himself to a penalty; but unless the marriage be declared void by the statute, it is valid.

82. The law, as before observed, commands and forbids. The principal and direct effect of a command or prohibition is to bind those to whom the law applies. Every obligation to obey, therefore, presumes a law which commands; and every law produces a binding obligation.

An *obligation* is a moral necessity to perform actions commanded by the law, or to abstain from actions forbidden by it, and to suffer those which are permitted.

No *right* can exist in favor of one person, unless there is imposed a *duty* on another. If I have the right to go over your field, I can have it only by virtue of some law, or what comes to the same thing, by virtue of an agreement sanctioned by law. It is your duty to let me pass through your field; you are obliged to permit me to do so.

Thus law, obligation, right and duty, are correlative terms. A *correlative* term is one which designates things which cannot exist one without the other; for example, father and son, etc.

The obligation which arises from the law is not a *physical* or *absolute* constraint. The law binds by the consideration of the punishments or rewards annexed to the infractions of its prohibitions, or to the observance of its precepts.

83. Laws have for their principal object to regulate the rights of citizens with each other, to declare what one may require to be done and what another

⁷ See *Mabin v. Coulon*, 4 Dall. 298; *Biddis v. James*, 6 Binn. Penn. 321; *Seidenbender v. Charles*, 4 Serg. & R. Penn. 159. This subject is more fully investigated hereafter.

must perform. As every one is free to renounce his rights, it follows that every citizen may *renounce* those provisions of law which are made in his favor, and which interest him only.

But as no man can control the rights of another, or what concerns the public, he cannot, by his agreement, renounce those provisions of law which concern public order or good morals.

The rule that a man may renounce the advantages which the law gives him, is subject to many exceptions. One may renounce an acquired right; for example, the right of being an heir after the estate is cast upon him. But he cannot always renounce *future advantages* to the *future effect* of a law, although its object may be to regulate the rights of individuals only.

The faculty of making a will may be given as an example. It is introduced for the benefit of individuals only; so is the right to plead the act of limitations; yet no man can deprive himself of the right to make a will, or to plead the act of limitations, before the right to plead it has been acquired.

The rule, then, that an individual may renounce a right given him by law, is subject to several exceptions, viz., whenever the law itself forbids the renunciation of such right; whenever it is clear that it is positively prohibited; whenever the provisions of the act are founded on some political or public cause, or concern the interest of a third person.

84. The sovereign authority can extend only over those who are subject to it; it cannot, therefore, regulate the rights of foreigners. But if they come within its territory, either to reside or to travel, they are considered as submitting themselves to the authority of the laws of the country, and they are bound by them. This is perfectly reasonable, for during their stay in the country they are protected by its laws.

85. Having examined the principal effects of the law, and the persons who are bound by it, the consideration of the persons who are to apply it, and how it is to be applied, remains to be examined.

We have seen that the executive and the legislative powers are separated from the judicial. This power is vested by the constitution and laws of the United States in the judiciary of the general government; and by the constitution and laws of each state in what are called the state courts. The examination of the jurisdiction and powers of the several courts will be deferred till we come to consider the remedies which the law has provided for the establishment of right and the repression of wrong.

86. The judges are bound to interpret or construe the law with fidelity and skill; they are required to judge according to law, not to judge the law. When the law is doubtful or ambiguous they are bound to declare what it is, and they cannot refuse to give an interpretation because it is obscure.

By *interpretation* is meant the judicial exposition of the meaning of the law; or it is the collection of its meaning out of signs the most probable.⁸

Construction has nearly the same meaning as interpretation.

In the supreme court of the United States the rule which has been uniformly observed in construing statutes, is to adopt the construction made by the courts of the country by whose legislature the statute was enacted. This rule may be susceptible of some modification when applied to British statutes which are adopted in any of these states. By adopting them, they become our own, as entirely as if they had been enacted by the legislature of the state.⁹

This received construction, in England, at the time they are admitted to operate in this country—indeed, to the time of our separation from the British

⁸ 1 Powell, Contr. 370.

⁹ Pennock v. Dialogue, 2 Pet. 1; Drennan v. People, 10 Mich. 169.

empire—may very properly be considered as accompanying the statutes themselves, and forming an integral part of them. But, however we may respect the subsequent decisions, (and certainly they are entitled to great respect,) we do not admit their absolute authority. If the English courts vary their construction of a statute, which is common to the two countries, we do not hold ourselves bound to fluctuate with them.¹⁰

87. There are two kinds of construction; the literal or strict, and the liberal.

A strict construction is one which limits the application of the provisions of the statute to cases clearly described by the words used. A liberal construction is one by which the letter is enlarged or restrained so as more effectually to accomplish the purpose of the statute.

88. The *strict* or *literal* interpretation of laws is applied to penal statutes. It is a rule that penal statutes must be construed strictly, but not against the manifest intention of the legislature, or so as to produce an absurdity.¹¹

Penal statutes are to be construed strictly, so as to bring the case within the definition of the law; but this rule is not so inflexible as to require that cases which can be decided by ordinary interpretation shall be construed as not coming within the law.¹²

A question frequently arises as to what is a *penal statute*. In general it is one which inflicts a punishment for the violation of its provisions or commands.¹³ But a statute for the prevention of fraud, for the suppression of a public wrong, or to effect a public good, is not, in a strict sense, penal, although it inflicts a penalty.¹⁴ And a statute, penal as to some of its provisions, if it is generally beneficial, may be liberally construed.¹⁵

Statutes in derogation of the common law are to be construed strictly.¹⁶

89. In civil cases, a liberal interpretation must be adopted in order to discover the meaning of the law, where it seems silent, and the courts are required to give a judgment and state what was the intention of the legislature; they are then the speaking law, *lex loquens*.

But this interpretation is not to be arbitrary, it ought to be founded on equity, provided that equity be directed by science; for without this the judge should tremble in his seat in the temple of justice, and without this the mind will only wander in search of a phantom of equity purely imaginary.

90. A number of *rules* have been adopted, the observance of which will enable the judge to discover the intention of the legislature, and thus decide what the law is. They are principally the following:

When the law is *clear*, it must not be eluded under the pretext of grasping its intention.¹⁷ Words must be taken in their usual and most known signification, unless they appear plainly to have been used in another sense;¹⁸ and in

¹⁰ Cathcart v. Robinson, 5 Pet. 280.

¹¹ Commonwealth v. Loring, 8 Pick. Mass. 370; Reed v. Davies, 8 id. 514; Crawford v. State, 1 Ala. 143; Butler v. Ricker, 6 Me. 268; The Enterprise, Paine, C. C. 32; United States v. Wiltberger, 5 Wheat. 76; Daggett v. State, 4 Conn. 61; Sprague v. Birdsall, 2 Cow. N. Y. 419; Mayer v. Davis, 6 Watts & S. Penn. 269; United States v. Wigglesworth, 2 Stor. C. C. 369; United States v. Gooding, 12 Wheat. 460.

¹² United States v. Wilson, Baldw. C. C. 78.

¹³ 1 Sharswood, Blackst. Comm. 88; Espinasse, Pen. Act. 1; Boscowen, Conv.; Sewell v. Jones, 9 Pick. Mass. 412.

¹⁴ Taylor v. United States, 8 How. 197.

¹⁵ Sickles v. Sharp, 13 Johns. N. Y. 497.

¹⁶ Melody v. Reab, 4 Mass. 471; Gibson v. Jenney, 15 Mass. 205; Lock v. Miller, 7 Ala. 13; Dwelly v. Dwelly, 46 Me. 377; Burnside v. Whitney, 21 N. Y. 148.

¹⁷ Crocker v. Crane, 21 Wend. N. Y. 211; Bartlett v. Morris, 18 Ala. 266; Coffin v. Rich, 45 Me. 507.

¹⁸ Merchants' Bank v. Cook, 4 Pick. Mass. 405; Gress v. Fowler, 21 Cal. 392.

the construction of an obscure law, the most natural sense is to be preferred, or that which is the least difficult of execution.¹⁹

To ascertain and fix the true sense of a law, we must examine the *context*, and, if it can be gathered from a subsequent statute, in *pari materia*, this will amount to a legislative declaration of its meaning, and will govern the construction of the first statute.²⁰ And a mistake apparent in one part of a statute, may be corrected by another part.²¹

The construction of each law must be made in relation to the *subject matter* of the statute.²²

Statutes must be construed as to their *effects* or *consequences*, so that where words bear either none or a very absurd signification, the intention ought to be adopted.²³

A statute should be construed by considering the *reason* and *spirit* of the act. But this can only take place when the plain import of the words is dubious.²⁴

Mere *failure of justice* is not a sufficient ground for construing a statute against its clear meaning so as to give a court jurisdiction.²⁵

A statute ought to be construed, if possible, so that *every word* shall have some force and effect,²⁶ and that no clause, sentence or word, shall be superfluous, void, or insignificant.²⁷

Statutes are to be construed *prospectively*, unless the contrary intention of the legislature be clearly expressed.²⁸

The rules for construing statutes are the *same* in equity that they are at law.²⁹

A posterior law shall be construed to repeal an anterior one, when they are inconsistent with each other.³⁰ *Posteriora derogant prioribus* is the rule.

If a statute is capable of two constructions, the one consistent with the Constitution will be adopted.³¹

91. The *repeal* of a law is to annul it and destroy all its force and effect. In the civil law, the term used for repeal is *abrogation*. It differs from *derogation*, which is only a partial *abrogation*: *derogatur legi, cum pars detrahitur; abrogatur legi, cum prorsus tollitur*.³² Laws are repealed by new laws, and they are derogated from either by provisions in the new laws, or by usage which has acquired the force of law.

92. The repeal is either express or implied; it is *express*, when it is literally declared by the new law, either in general terms, as where a provision declares all laws contrary to the repealing act to be repealed, or in special terms, when such and such laws, which are named and identified, are repealed.³³

93. It is *implied*, when the new law contains provisions contrary to those

¹⁹ 1 Sharswood, Blackst. Comm. 60.

²⁰ United States v. Freeman, 3 How. 556; Manuel v. Manuel, 13 Ohio St. 458. But see Ingalls v. Cole, 47 Me. 530.

²¹ Blanchard v. Sprague, 3 Sumn. C. C. 279.

²² Ruggles v. Washington County, 3 Mo. 496; Ex parte Hall, 1 Pick. Mass. 261; Woodworth v. Paine, 1 Ill. 294; Jacob v. United States, 1 Brock. C. C. 520.

²³ Henry v. Tilson, 17 Vt. 479.

²⁴ Kilby Bank v. Petitioners, 23 Pick. Mass. 93; Opinion of the Justices, 22 Pick. Mass. 571; State v. Clark, 5 Dutch. N. J. 96.

²⁵ Pitman v. Flint, 10 Pick. Mass. 506. ²⁶ Opinion of the Justices, 22 Pick. Mass. 571.

²⁷ Jones v. Dubois, 1 Harr. Del. 285; Hutchen v. Niblo, 4 Blackf. Ind. 148.

²⁸ Hastings v. Lane, 22 Me. 134; Garrett v. Doe, 2 Ill. 335; Guard v. Rowan, 3 Ill. 499; Forsyth v. Marbury, R. M. Charlt. Ga. 324.

²⁹ Talbot v. Simpson, Pet. C. C. 188.

³⁰ Morris v. Delaware Canal, 4 Watts & S. Penn. 461; Casey v. Harned, 5 Clarke, Iowa, 1; State v. Smith, 7 id. 244; Edgar v. Greer, 8 id. 394.

³¹ Duncombe v. Prindle, 12 Iowa, 1.

³² Dig. 50, 17, 102. ³³ State v. Stinson, 17 Me. 154.

of former laws, without expressly repealing them: *posteriora derogant prioribus* is the maxim in such cases, as has been already observed,³⁴ though the law does not favor repeals by implication.³⁵

The rule *posteriora derogant prioribus* must, however, be applied with great discretion; for as the laws ought not to be changed, modified or repealed, except with great consideration, the repeal of the old by the new laws ought not to be presumed; there must be a formal conflict between the two laws, in order that the old shall be impliedly repealed by the new.³⁶

When the laws are in conflict only as to some points, the new derogates from the old only as to those points, and the remainder is in full force.³⁷

94. Usage and custom have also much force to construe or abrogate old laws, and *non user* for a great length of time will have the effect of a repeal. But it must be a very strong case which will have that effect.³⁸

95. Whenever rights have become vested by virtue of a statute, which is afterwards repealed, such rights are not affected by the repeal.³⁹ But inchoate rights, derived from a statute, are generally lost by its repeal, unless expressly excepted.⁴⁰

When a penal statute is repealed, a violation before its repeal cannot be punished afterwards, for then there is no law to authorize the punishment.⁴¹ In general there is an exception as to the extent of the repeal, and the statute remains in force as to such violations.

Proceedings commenced under a statute are arrested by its repeal, because after that there is no law authorizing them.⁴²

At common law the repeal of a statute, which was itself a repealing statute, revives the first.⁴³ But in some states this rule has been changed by a legislative act.⁴⁴

96. Laws may be divided into four principal kinds, namely, natural law; the law of nations; public law; private or civil law.

Having considered these general laws in another place,⁴⁵ this title will be confined to the laws of the United States and of the several states. When considered as to their several kinds, laws are express or tacit; when as to their object, they are civil and criminal, they relate to the law merchant, the municipal law, and the law martial; when as to their duration, they are immutable and arbitrary; when as to their origin, they are national or domestic laws and foreign laws; when as to their extent, they extend over the United States, over their territories, and over ships.

³⁴ *Milne v. Huber*, 3 McLean, C. C. 212.

³⁵ *Snell v. Bridgewater*, 24 Pick. Mass. 296; *Bowen v. Lease*, 5 Hill. N. Y. 221; *Wyman v. Campbell*, 15 Ala. 219; *Street v. Commonwealth*, 6 Watts & S. Penn. 209.

³⁶ *Kinney v. Mallory*, 3 Ala. 626; *Bowen v. Lease*, 5 Hill. N. Y. 221; *In re Brown*, 21 Wend. N. Y. 316; *Commonwealth v. Cromly*, 1 Ashm. Penn. 179; *Davies v. Fairbairn*, 3 How. 636; *Pearce v. Bank of Mobile*, 33 Ala. n. s. 693; *McCool v. Smith*, 1 Black, 459; *State v. Berry*, 12 Iowa, 58; *Naylor v. Field*, 5 Dutch. N. J. 287.

³⁷ *Elrod v. Gilliland*, 27 Ga. 467.

³⁸ *Wright v. Crane*, 13 Serg. & R. Penn. 452; *Rutherford*, Inst. b. 2, c. 6, s. 19; *Merlin*, Rep. Desuetude.

³⁹ *Davis v. Minor*, 2 Miss. 183; *James v. Dubois*, 1 Harr. Del. 285; *Rice v. Railroad Co.* 1 Black, 358.

⁴⁰ *Butler v. Palmer*, 1 Hill, N. Y. 324; *Bailey v. Mason*, 4 Minn. 546.

⁴¹ *Commonwealth v. Welsh*, 2 Dan. Ky. 330; *Road in Hatfield*, 4 Yeates, Penn. 392; *Anonymous*, 1 Wash. C. C. 84; *Atto v. Commonwealth*, 2 Va. Cas. 382; *Hartung v. People*, 22 N. Y. 95.

⁴² *North Canal*, 10 Watts, Penn. 351; *Wall v. State*, 18 Tex. 682.

⁴³ *Directors v. Railroad Co.* 7 Watts & S. Penn. 236; *Commonwealth v. Churchill*, 2 Metc. Mass. 118; *Commonwealth v. Mott*, 21 Pick. Mass. 492; *Hastings v. Aiken*, 1 Gray, Mass. 163; *contra Smith v. Hoyt*, 14 Wise, 252.

⁴⁴ *La. Civ. Code*, art. 23; *Tallamon v. Cardenas*, 14 La. Ann. 509.

⁴⁵ Before, 9.

97. Blackstone, Hale and others, have divided laws, when considering the source whence they arose, into *lex scripta* and *lex non scripta*. By the former they designate the statute law, and by the latter the common law.⁴⁶ This division is not exact as applied to American law. Our constitutions, treaties, orders or rules of court, would come within the definition of *lex scripta* as well as statutes; and the common law is not literally *lex non scripta*.

A preferable mode of dividing them has been adopted. They are *express*, or made directly and expressly for the people by the legislative power; and *tacit*, when they receive their force from the general adoption of them by the people.

98. The *express laws* are, first, the constitution of the United States; secondly, the treaties made with foreign powers; thirdly, the acts of congress; fourthly, the constitutions of the respective states; fifthly, the laws of the several state legislatures; sixthly, laws made by inferior legislative bodies, such as the councils of the municipal corporations, and *general rules* made by the courts.

99. The *Constitution of the United States* is an act of the people themselves, made by their representatives elected for that purpose. It is the supreme law of the land and binding on all future legislatures, until it shall be altered by the people in the manner provided for in the instrument itself.⁴⁷

100. *Treaties* constitutionally made are declared to be the supreme law of the land.⁴⁸ A *treaty* is a compact made between two or more independent nations, with a view to the public welfare. Treaties are for a perpetuity, or for a considerable time. When contracts between nations are performed by a single act, and their execution is at an end at once, they are not called treaties, but *agreements, conventions or pactions*.

Treaties are made by the president and senate on the part of the United States.⁴⁹ No state of the Union can enter into a treaty with a foreign government, or with another state.⁵⁰

101. Acts and resolutions of congress, enacted constitutionally, are of course binding. These are called *statutes*, and they are of several kinds, namely, constitutional and unconstitutional; public and private; declaratory and remedial; preceptive, prohibitive, permissive and penal; temporary and perpetual; affirmative and negative; prospective and retrospective.

102. A *constitutional law* is one made by the legislative power properly organized, according to the requisitions of the constitution. Such a law is binding upon all the people, citizens and others, who are within the territorial jurisdiction of the legislature.

103. An *unconstitutional law* is one made in contravention of the requisitions of the constitution, and for that reason it is, *ipso facto*, void, because the constitution has greater force than any law, it being the supreme law of the land, as already observed.

The courts have the power, and it is their duty, when the law is unconstitutional, to declare it to be so;⁵¹ but this is not done, except in a clear case, and, as an additional guard against error, the supreme court of the United States refuses to take up a case involving a constitutional question, when the court is not full.⁵²

104. *Public statutes* are those which are of universal rule and regard the

⁴⁶ 1 Sharswood, Blackst. Comm. 63.

⁴⁷ U. S. Const. art. 6, n. 2.

⁴⁸ *United States v. Peggy*, 1 Cranch, 103; *Gordon v. Kerr*, 1 Wash. C. C. 322.

⁴⁹ Before, 51; U. S. Const. art. 2, s. 2, n. 2.

⁵⁰ U. S. Const. art. 1, s. 10, n. 1, 2.

⁵¹ *The Federalist*, No. 78; *Marbury v. Madison*, 1 Cranch, 137; *People v. Platt*, 17 Johns. N. Y. 195.

⁵² *Mayor v. Miln*, 9 Pet. 85.

whole community. The courts will take judicial notice of them without pleading.⁵³ A declaration in the statute that it is public, is conclusive.⁵⁴

106. *Private statutes* are those which concern only particular persons or classes of persons.⁵⁵ The courts will not take judicial notice of them unless they are pleaded.

108. A *declaratory statute* is one which is passed in order to put an end to a doubt as to what is the common law or the meaning of another statute, and which declares what it is and ever has been.

107. A *remedial statute* is one which supplies such defects, and abridges such superfluities in the former law, as may have been discovered.⁵⁶ This is done by enlarging or restraining the former law, and these remedial statutes are therefore called *enlarging statutes* or *restraining statutes*.

The term remedial statute is also applied to one which gives the party injured a remedy; in some respects such statute is a penal law.⁵⁷

108. When the statute commands certain actions, and regulates the forms and acts which ought to accompany them, it is called a *preceptive statute*.

109. When it forbids actions which disturb the public repose, or injury to the rights of others, or crimes and misdemeanors; or when it forbids certain acts in relation to the transmission of estates, the capacity of persons and other objects, it is a *prohibitive statute*.

110. When it allows certain actions without commanding them; for example, when it allows any one who is competent, to make a will; such a statute is *permissive*.

111. *Penal statutes* are those which order or prohibit a thing under a certain penalty.

112. A *temporary statute* is one which is limited in its duration at the time of its enactment. It continues in force until the time of its limitation has expired, unless sooner repealed.

113. A *perpetual statute* is one for the continuance of which there is no limited time, although it be not expressly declared to be so. If, however, a statute which does not itself contain any limitation, is to be governed by another which is temporary only, the former will also be temporary and dependent upon the existence of the latter.⁵⁸

114. An *affirmative statute* is one which is enacted in affirmative terms; such statute does not take away the common law. If, for example, a statute without negative words, declares that when certain requisites shall have been complied with, deeds shall have in evidence a certain effect, this does not prevent their being used in evidence, though the requisites have not been complied with, in the same manner they might have been before the statute was passed.⁵⁹

115. A *negative statute* is one expressed in negative terms, and so controls the common law, that it has no force in opposition to the statute.⁶⁰

116. A *prospective law* is one which regulates the future, and is the only one which can be just, for no man can conform himself to the law which is yet unknown to him.

117. A *retrospective statute* is one which is made to operate upon some subject, contract or crime, which existed before its enactment.

These laws are generally unjust, and are, to a certain extent, forbidden by

⁵³ Gorham v. Springfield, 27 Me. 58.

⁵⁴ Brookville Ins. Co. v. Records, 5 Blackf. Ind. 170.

⁵⁵ 1 Sharswood, Blackst. Comm. 86.

⁵⁶ 1 Sharswood, Blackst. Comm. 86.

⁵⁷ Espinasse, Pen. Act. 1.

⁵⁸ Bacon, Abr. Statutes, (D.)

⁵⁹ Jackson v. Brady, 2 Caines, N. Y. 169.

⁶⁰ Brown, Parl. Cas. 72; Bacon, Abr. Statutes, (G.)

that article in the constitution of the United States which prohibits the passage of *ex post facto* laws, or laws impairing the obligation of contracts.

An *ex post facto* law is one which renders an act punishable in a manner in which it was not punishable when it was committed.⁶¹ This prohibition applies only to crimes.⁶²

The right to pass retrospective laws, subject to the exceptions mentioned, exists in the several states, if not forbidden by their own constitutions.⁶³ And instances are to be found where the legislature have set aside a decree of a court,⁶⁴ and opened a judgment.⁶⁵

118. The constitution and laws of the respective states, if not in conflict with the constitution of the United States, are of binding force in the states respectively.

119. Laws made by lawful inferior legislative bodies usually known by the name of *ordinances*, have full force within their respective jurisdictions. Such are the ordinances of a municipal corporation. And *general rules* and *orders* of court, when not violating the constitution or laws, have the effect of laws in such courts.

120. The *tacit* laws, which derive their authority from the common consent of the people, without any legislative enactment, may be subdivided as follows:

121. The *common law* is a system of rules which have been used by the universal consent and immemorial practice of the people, without receiving the express authority of the legislative power. It is derived principally from two sources, the common law of England, and the practice and decisions of our own courts. No general rule has been adopted to ascertain what part of the English common law is valid and binding. To run the line of distinction is a subject of embarrassment to the courts, and the want of it a great perplexity to the student.⁶⁶

It is generally binding where it has not been superseded by the constitution of the United States, or of the several states, or by their legislative enactments, or varied by custom, and when it is founded in reason, and it is consonant to the genius and manners of the people.⁶⁷ Into the common law have been grafted many principles derived from other systems.

Customs form a part of the common law. A custom is a usage which has acquired the force of law. It derives its binding authority from the tacit consent of the legislature and the people; it follows, therefore, that there can be no custom in relation to a matter regulated by statute. Law cannot be established or abrogated, except by the sovereign will; but this will may be expressed, or implied or presumed, and whether it manifests itself by words or by acts is of little consequence.

To make a good custom, it must be public, peaceable, uniform, general, continued, reasonable and certain. It then acquires the form of law.

Customs are general or particular. By *general custom* is meant the common law itself, by which proceedings and determinations in court are guided. *Particular customs* are those which affect the inhabitants of some particular districts only.

122. The *Roman* or *civil* law has furnished many rules, and is constantly supplying the common law with maxims which appear there without any

⁶¹ Fletcher v. Peck, 6 Cranch, 138.

⁶² Story, Const. § 1339.

⁶³ Hess v. Werts, 4 Serg. & R. Penn. 364; Watson v. Mercer, 8 Pet. 88; Satterlee v. Matthewson, 2 Pet. 413.

⁶⁴ Calder v. Bull, 3 Dall. 386.

⁶⁵ Braddee v. Brownfield, 2 Watts & S. Penn. 271.

⁶⁶ Kirby, Conn. Pref.

⁶⁷ United States v. Wonson, 1 Gall. C. C. 20; James and Catherine, Baldw. C. C. 554; Parsons v. Bedford, 3 Pet. 446.

acknowledgment of their paternity. This law is the source of wisdom, from which many of our judges have drawn with unsparing hands, to adorn their judgments. The proceedings of the courts of equity, and many of the admirable distinctions which manifest their wisdom, flow from this source. And from this great storehouse the courts of admiralty have borrowed most of the laws which govern in admiralty cases. The civil law is to be found in the Institutes of Justinian, the Pandects, the Novels, and the Code,⁶⁸ and their numerous commentators.

123. The *Canon law* is a system of Roman ecclesiastical law, relative to such matters as the church of Rome either has or pretends to have jurisdiction over. Many of the rules of this system have been adopted by the English ecclesiastical law, and they have been incorporated into ours. Perhaps all, or at least a great number of rules relating to administrations, wills, and marriages, have been derived from the ecclesiastical law.⁶⁹

124. Those laws which regulate civil matters between individuals, are called *civil laws*, in contradistinction to those which regulate criminal matters, and provide for the repression and punishment of crimes, which are called *criminal laws*.

125. Those which form a system of customs acknowledged and taken notice of by all commercial nations, are called the *law merchant*. These customs constitute a part of the general law of the land; and, being part of that law, their existence cannot be proved by witnesses, but the judges are bound to take notice of them *ex officio*.⁷⁰

126. *Municipal law* has been already considered.⁷¹

127. *Martial law* is that military rule and authority which exists in time of war, and is conferred by the laws of war, in relation to persons and things under and within the scope of active military operations, in carrying on the war, and which extinguishes or suspends civil rights and the remedies founded upon them, for the time being, so far as is necessary in order to the full accomplishment of the purposes of the war. It is also the application of military government to persons and property within its scope according to the laws and usages of war, to the exclusion of the municipal government.⁷²

128. Those laws are *immutable* which are founded on the laws of nature, and if ever altered by men, are not binding, because the laws of God are superior to all human laws.

129. An *arbitrary law* is one made by the legislator, simply because he wills it, and is not founded in the nature of things; such law, for example, as the tariff law, which may be high or low.

130. Laws enacted by the government of the United States, duly constituted, are *national* or *domestic* laws. These have a binding force over the whole country, as will be shown hereafter.

The laws of each state are obligatory on all persons in the state, but do not extend beyond their territorial jurisdictions. Considered with regard to their connection with each other, the states are foreign to one another.

131. The laws of a foreign country are said to be *foreign laws*. They have no force to regulate any thing out of their jurisdiction; but sometimes contracts are made in a foreign country, which are broken in this, and a remedy

⁶⁸ Bouvier, Law Dict., *Civil Law*. By the phrase Civil Law, is meant the whole body of Roman jurisprudence promulgated by Justinian and his successors. This does not include the *Jus Ante-Justinianum*, a part of which was composed of the Laws of the Twelve Tables. Walker, Inquiry, 26, 27.

⁶⁹ 1 Sharswood, Blackst. Comm. 82; Bouvier, Law Dict., *Canon Law*.

⁷⁰ See Beawes, *Lex Merc.*; Cain, *Lex Merc. Am.*; Pardessus, *Dr. Comm.*

⁷¹ Before, 11.

⁷² See N. A. Review, Oct. 1861. article by Prof. Joel Parker.

is sought here. In such case, the matter in dispute is to be adjudicated in this country by the law of the country where the contract was made.⁷³

But there is an exception to the universal validity of this rule. A foreign law, which violates the law of nature, or the laws of this country, or which opposes our national policy or institutions,⁷⁴ will not be enforced here.

132. The laws of congress extend over all the United States. Not only those which originally formed the federal compact, but also over those which have been admitted since, whether they were formed out of the original territory, or of that acquired from France, by the treaty which ceded Louisiana to the United States; Florida from Spain; or that which was annexed by an agreement with the independent republic of Texas, and which annexation has since been recognized and sanctioned; or the additional territory which has been granted to the United States, by treaties made with Mexico; or the territory ceded by Russia.

How far the country extends into the *open sea*, is a question not easily solved. Though the open sea be not capable of being possessed as private property by a nation, yet the waters on the coast to a certain extent are considered as belonging to the territory. By the law of nations, this space is limited to a marine league,⁷⁵ though a claim extending farther than this has been made by the United States.⁷⁶

The constitution provides that new states may be admitted by congress into this Union; but no new state shall be formed by the junction of two or more states, or parts of states, without the consent of the legislature of the states concerned, as well as of congress.⁷⁷

These states, when once established, are considered as upon an equal footing with the original states, and the laws of the Union bind them.

133. By *territory* is understood, in the sense in which this word is used in the constitution, that portion of the country subject, and belonging to the United States, which is not within the boundaries of any of the states, or within the District of Columbia.

The constitution directs that the congress shall have power to dispose of, and make all needful rules and regulations, respecting the territory or other property belonging to the United States.⁷⁸

These territories are organized by act of congress, and have a government to make their local laws, generally having the powers which have been retained by the states; with courts established to administer justice.

134. The laws of the United States extend over all merchant ships owned by citizens of the United States, and ships of war of the United States in the open sea generally, or while lying in a foreign port or place, and also over the crews.⁷⁹

135. Having taken this general view of the laws, the consideration of their application to persons, to things, and to actions, will next be the subject of inquiry. For this purpose this work will be divided into five books. In the first, we will treat of persons; in the second, of things; injuries and wrongs will be the subject of the third; in the fourth, will be explained what remedies can be had at law for injuries; and in the fifth, the nature and proceedings in equity.

⁷³ Story, Conf. of Laws, § 242.

⁷⁴ Story, Conf. of Laws, § 246 to § 260.

⁷⁵ Vattel, Dr. Civ. l. 1, c. 23, n. 289; Chitty, Law of N. 113; Marten, Law of N. B. 1, c. 8. § 6; 3 Rob. Adm. 102; 3 Hagg. Adm. 257.

⁷⁶ 1 Kent, Comm. 29, 30. But see Sergeant, Const. L. 219, 2d ed.

⁷⁷ U. S. Const. art. 4, s. 3, n. 1.

⁷⁸ U. S. Const. art. 4, s. 3, n. 2.

⁷⁹ Act of Congr. Sept. 24, 1789, s. 9, 11; 1 stat. 76; act of Congr. April 30, 1790; 1 stat. 113; act of Congr. March 3, 1825, s. 5; 4 stat. 115; 1 Kent, Comm. 362, 363.

FIRST BOOK.

OF PERSONS.

CHAPTER I.

NATURAL PERSONS.

- 137. Definition.
- 138. The state of persons.
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- 149. Public persons.
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- 151. Difference as to sex.
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- 158. Husband and wife. Parent and child.
- 159. Citizens and aliens.
- 160. Citizens.
- 163. Aliens.
- 164. Freemen.
- 165. Slaves.
- 171. White and colored persons.
- 172. Nobles and plebeians.
- 173. Sane and insane.
- 174. Infamous persons.
- 175. Persons born and not born.

136. Persons are divided into natural and artificial. These will be considered separately.

137. Men, women and children are called natural persons; but, in another sense, by person is meant the part which a man plays in society. In law, man and person are not exactly synonymous terms.¹ Any human being is a man,²

¹ Toullier has given us the derivation of the word person, which will render sufficiently clear its true meaning. He says:—

“The word person, in its primitive and natural sense, signifies the mask with which actors, who played dramatic pieces in Rome and Greece, covered their heads. These pieces were played in public places, and afterward in such vast amphitheatres, that it was impossible for a man to make himself heard by all the spectators. Recourse was had to art; the head of each actor was enveloped with a mask, the figure of which represented the part he was to play, and it was so contrived that the opening for the emission of his voice made the sounds clearer, and more resounding, *vox personabat*: whence the name *persona* was given to the instrument or mask which facilitated the resounding of his voice. The name *persona* was afterward applied to the part itself, which the actor had undertaken to play, because the face of the mask was adapted to the age, and to the character of him who was considered as speaking, and sometimes it was his own portrait. It is in this last sense of personage, or of the part which an individual plays, that the word *persona* is employed in jurisprudence, in opposition to the word man, *homo*. When we speak of a person, we only consider the state of the man, the part he plays in society, abstractedly, without considering the individual.”—Toullier, Dr. Civ. Fr. l. 1, n. 168.

² Bouvier, Law Dict., Man.

whether he be a member of society or not, and whatever may be the rank he holds, whatever may be his age, his sex, etc. A person is a man considered according to the rank he holds in society, with all the rights to which the place he holds entitles him, and the duties which it imposes.³ A slave, though a man, is in general considered not as a person, but a thing. For some purposes he is considered a person.⁴

138. The word *state* or condition of persons, has various acceptations. When we speak of a person, we consider only the part a man plays in society, without taking into view the individual. State and person are then correlative terms.

If we inquire into its origin, the word *state* will be found to come from the Latin *status*, which is derived from the verb *stare*, *sto*, whence has been made *statio*, which signifies the place where a person is located, *stat*, to fulfil the obligations which are imposed upon him.⁵

State, then, is that quality which belongs to a person in society, and which secures to and imposes upon him, different rights and duties, in consequence of the differences of that quality.

139. Although all men come from the hands of nature upon an equality, yet there are among them marked natural differences. The distinctions of sex, parentage, age, youth, etc., all come from nature.

To these natural qualities, the civil or municipal laws have added distinctions which are purely civil and arbitrary, founded on the manners of the people, or the will of the legislature. Such are the differences which these laws have established between magistrates and private citizens or subjects; and between freemen and slaves.

140. Although these latter distinctions are more particularly subject to the civil and municipal law, because to it they owe their origin, it nevertheless extends its authority over the natural qualities, not to destroy or weaken them, but to confirm them, and to render them more inviolable by positive rules and by certain maxims.

141. This union of the civil or municipal law with the law of nature, form among men a third species of differences which may be called mixed, because they participate of both, and derive their principle from nature and the perfection of the law; for example, infancy, or the privileges which belong to it, have their foundation in the law of nature; but the age, and the term of these prerogatives, are determined by the civil or municipal law.

142. From these premises, it is easy to perceive that three sorts of different qualities, which form the state or condition of men, may be distinguished: those which are purely natural, those which are purely civil, and those which are composed of natural and civil or municipal law.

143. If we analyze what are the qualities which compose the state of a person, we will find they have a necessary or essential connection with public, or political, or private right, and that they are either qualities of state or distinctions of state, because they render the party either able or unable to participate to the public state or the private state.

³ Toullier, Dr. Civ. Fr. l. 1. n. 168.

⁴ State v. Thackam, 1 Bay, So. C. 358. In the fourth article of the constitution of the United States, the word person is used in the sense of man: "no person held to labor," evidently refers to slaves.

⁵ At Rome, by state was understood the inscription of the name of an individual on the registers, or census. The state was the same as *caput*, head: by *capite censi* was meant those who had declared to the censors that they had nothing of their own, neither property nor posterity. They could then be numbered only by their heads. None were inscribed on the list or census except freemen, citizens, and heads of families. And thus the word head, *caput*, signified simply a state of liberty, of citizenship, and of family. The slave, who was deprived of all state, was said to have no head: *caput non habere*.

144. Let us commence, for example, with public or political right. It is a question as to his state, which settles, whether a man is a freeman or a slave, a citizen or an alien; because if he is free and a citizen, he is qualified to render service to his country in all public stations or offices; if, on the contrary, he is a slave or an alien, he is excluded by both of these qualities from filling any functions which are connected with public or political right, and from all advantages which the law grants only to those who are entitled to participate in them.

145. The rule is the same with regard to private rights. The state of a person is confined to the regulation of contracts or engagements and descents. It is used to determine what connections the private state of an individual, and his contracts or engagements, or his rights to inherit by descent, have with each other, and what renders men capable or incapable of making contracts or taking by descent.

Thus, the state of majority renders a man capable of entering into all sorts of obligations; that of infancy prevents him from forming many; these qualities must be classed among those which determine the state of a person.

The quality of a legitimate or an illegitimate child, renders him capable or incapable of taking by descent; it is, therefore, the quality of the person, in this case, which constitutes his state.

146. The *public state* consists in a capacity founded in nature, or the law, or arising from both, to participate in all offices, honors, and all other prerogatives, which are the right of those who are considered members of the nation.

147. The *private state* is a quality, which no agreement can alone establish, but which is the effect of natural or civil law, or both of them, and which renders those who possess it capable or incapable of certain kinds of conventions or agreements; or even of all agreements, and by which they are capable or incapable of taking by descent.

148. Many changes take place in the state of a person; the principal of which are the following:—

Civil death. By which a man loses his political and civil rights.

Interdiction. By this is meant a legal restraint, by the sentence of a competent tribunal, upon a person incapable of managing his estate, because of mental incapacity.

Marriage. When a single woman marries she experiences a change in her state; she falls into the power of another, and becomes incapable of making a contract without the consent of her husband; but when the marriage is dissolved there is another change, by which she is freed from the marital restraint.

149. In the United States *public persons* have but few privileges more than private citizens; these are granted to them, not for their own advantage, but for the public good; as for example, a congressman cannot be arrested nor sued, in a civil case, while attending to his duty in congress, because the public interest requires his undivided attention there. Public persons are magistrates of various grades, from the President of the United States down to the constable.

150. All persons who do not fill official stations are private persons. These will be considered in separate classes.

151. The physical difference between male and female animals is called sex. In the human species the male is called man, and the female woman. The first difference which nature has established among persons is that of the sexes: *inter masculos et feminas.*

152. The condition of woman is, in many respects, less advantageous than that of man. This difference is owing in part to nature, and partly to our customs, and to the positive institutions of society.

Let us examine the question between husband and wife. By the natural law, the superior control in a state of marriage belongs to the man rather than the woman; perfect equality is impossible, and, as the marriage is a partnership between two persons, one must have the controlling voice, when both cannot agree. The preponderating voice belongs to the husband rather than to the wife; he is stronger and more courageous, he works to support the family of which he is the head, and which he is bound to protect and defend; woman then must yield to him, whom nature and the law have provided for her as a guide and protector.

This is the source of the prerogatives which the husband has over the wife. Hence it follows, that the wife cannot make any contracts binding upon herself, without the express or implied authority of her husband, nor make a will—the existence of a married woman being merged, by a fiction of law, in the being of her husband.⁶

153. Single women, when of full age, have all the civil rights of men; they may, therefore, enter into contracts and engagements; make wills; sue and be sued; be trustees or guardians; they may be witnesses, and for that purpose may attest all papers. Among the civilians they may dispose of their property and make contracts like men, but they cannot be guardians nor attesting witnesses.⁷

154. In general, women possess no political power; they cannot hold office nor vote for officers. Instances occur, however, of their being appointed post-mistresses.

155. The prerogatives granted to age, take their rise in the law of nature. Nothing is better calculated to support public morals than a perfect subordination of the young to the aged.⁸ The want of proper regard and deference to old age has always been considered as one of the most strongly marked features of depravation.

But, as it cannot be ascertained when each individual has been so far developed as to act for himself, the law has fixed an age at which all, who attain it, are presumed to have their proper faculties. The time fixed by law, then, establishes a legal presumption of legal capacity.

156. Before arriving at fourteen years, a male is said not to be of discretion; by the common law, at that age he may consent to marriage, and choose a guardian; at twenty-one, he is of full age for all private purposes, and he may then exercise his rights as a citizen, by voting for public officers; and, being a citizen, he is eligible to all offices, unless otherwise provided for in the constitution. At twenty-five, he may be elected to congress; at thirty, a senator of the United States; and at thirty-five, he may be elected President of the United States, if otherwise properly qualified.

157. At twelve, a woman arrives at years of discretion, and may consent to marriage; at fourteen, she may choose a guardian; and at twenty-one, as in the case of males, she is of full age, and may exercise all the rights which are inherent to her sex.

158. The third difference between persons, is that which results from the relations established between husband and wife, and parent and child. This subject will be considered in another place.

159. Another difference between persons, exists between citizens and aliens. These will be separately considered.

160. A *citizen* of the United States is one who is in the enjoyment of all

⁶ The status of married women has been very much changed in many of the states, of late years, as will appear subsequently.

⁷ 1 Toullier, Dr. Civ. Fr. n. 187.

⁸ Montesquieu, Esp. des L. l. 5. c. 7.

the rights to which the people are entitled, and bound to fulfil the duties to which they are subject; this includes men, women and children.⁹ In a more limited sense, a citizen is one who has a right to vote for public officers; for example, representatives in congress, and who is qualified to fill offices in the gift of the people.

Citizens are natives or naturalized. All persons born in the United States are not citizens. The exceptions are, first, children of foreign ambassadors; secondly, Indians.¹⁰

161. A *naturalized citizen* is one who, born an alien, has acquired the right of a citizen by complying with the requisition of the naturalization laws.¹¹ The principal of which are,

That the applicant shall be an alien, and a free white person.¹²

That he shall have declared before some competent tribunal, on oath or affirmation, two¹³ years at least before his admission, that it was, *bona fide*, his intention to become a citizen of the United States, and to renounce forever all allegiance and fidelity to every foreign prince, etc., and particularly, by name, the prince, etc., whereof such alien may at the time be a citizen or subject. But if such applicant has resided and continued to reside in the United States between the 14th day of April, 1802, and the 18th of June 1812, he may be admitted without making a previous declaration.¹⁴

That at the time he shall be admitted, by the said tribunal, to become a citizen of the United States, he shall so renounce such allegiance.

That the said alien shall have resided at least five years within the United States, and in such state or territory where such court is held, one year at least. By subsequent acts, provisions are made in favor of persons who have arrived in the United States at different periods.¹⁵

That the applicant is a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same.

That he shall renounce all titles of nobility to which he may be entitled.

That the native country of such alien is then at peace with the United States.¹⁶

There are two classes of persons, who, though born out of the United States, are nevertheless citizens thereof. To the first class belong children of American ambassadors born abroad. Among the second class are "the children of persons duly naturalized under any of the laws of the United States, or who, previous to the passing of any law upon that subject by the government of the United States, may have become citizens of any one of the said states, under the laws thereof, being under the age of twenty-one years at the time of their parents being so naturalized or admitted to the rights of citizenship,

⁹ *Amy v. Smith*, 1 Litt. Ky. 334.

¹⁰ The most important exception heretofore has been persons of color. But the whole aspect of the case is now changed by the thirteenth amendment to the constitution abolishing slavery, and the fourteenth amendment which provides that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof are citizens of the United States and of the state where they reside." Still in some states persons of color are deprived of the right of voting and of holding office.

¹¹ Congress has the exclusive power to pass naturalization laws. U. S. Const. art. 1, s. 8, n. 5; *Thurlow v. Massachusetts*, 5 How. 585; *Smith v. Turner*, 7 How. 556.

¹² The act of July 17, 1862; 12 Stat. 597 omits the words "free white."

¹³ Act of Congr. May 26, 1824, s. 4; 4 Stat. 69.

¹⁴ Act of Congr. May 24, 1828; 4 Stat. 310.

¹⁵ See acts of Congr. April 14, 1802; 2 Stat. 153; March 26, 1804; 2 Stat. 292; March 3, 1813; 2 Stat. 811; March 22, 1816; 3 Stat. 259; May 26, 1824; 4 Stat. 69; May 24, 1828; 4 Stat. 310.

¹⁶ Act of Congr. April 14, 1802; 2 Stat. 153.

shall, if dwelling in the United States, be considered as citizens of the United States: provided, that the right of citizenship shall not descend to persons whose fathers have never resided within the United States."¹⁷

The widow and children of an alien who dies after making his declaration and before being naturalized, may become citizens upon taking the prescribed oaths.¹⁸

Aliens who arrive in the United States during their minority, and reside here three years next preceding their attaining the age of twenty-one, may become citizens after a residence of five years without a previous declaration.¹⁹

Any alien of the age of twenty-one years or more who serves in the regular army or volunteer forces of the United States and is honorably discharged, may become a citizen without any previous declaration, and need only prove one year's residence.²⁰

162. The Constitution of the United States provides, that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."²¹

This clause of the constitution evidently refers to the privilege or capacity of taking, holding, and conveying lands lying within any state of the Union, and also of enjoying all civil rights which citizens of any state were entitled to; but it cannot be extended to give a citizen of another state a right to vote or hold office immediately on his entering the state.²²

The constitution also provides that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."²³

163. An *alien* is one born out of the jurisdiction of the United States, subject to some foreign prince, potentate, state or sovereignty, and who has never been naturalized under the constitution or laws of the United States, or any of them.

There must be a union of birth abroad, and subjection to some other power to make an alien; for, as we have seen, a man may be born in a foreign country and still be a citizen of the United States, and of no other country whatever.

The rights and duties of aliens will be properly considered when we come to treat of the enjoyment of their civil rights.

164. A *freeman* is one who has a right to do whatever he pleases, not forbidden by law; one in the possession of the civil rights enjoyed by the people generally.²⁴ It is not necessary that a man should have any political power to be a freeman; an alien may be a freeman as well as a citizen. Although he may be liable to serve another for a period of time, still he is a freeman, if such service has arisen in consequence of his agreement; as in the case of an apprentice, who has bound himself to serve another for a definite period. Nor would a servant bound to serve another for a certain period, be less a freeman by his liability so to serve.

¹⁷ Act of Congr. April 14, 1802, s. 4; 2 Stat. 153.

¹⁸ Act of Congr. March 26, 1804, s. 2; 2 Stat. 202.

¹⁹ Act of Congr. May 26, 1824, s. 1; 4 Stat. 69.

²⁰ Act of Congr. July 17, 1862, s. 21; 12 Stat. 597.

²¹ U. S. Const. art. 4, s. 2.

²² *Ward v. Morris*, 4 Harr. & M'H. Md. 341; *Corfield v. Coryell*, 4 Wash. C. C. 371; *Story*, Const. § 1800; *Livingston v. Van Ingen*, 9 Johns. N. Y. 507; *Gassiers v. Ballon*, 6 Pet. 761; *Conner v. Elliott*, 18 How. 591.

²³ U. S. Const. amend. 14, s. 1.

²⁴ *Hobbs v. Fogg*, 6 Watts, Penn. 556.

165. A *slave* is one who is by law deprived of his liberty for life, and who is the property of another. One who has been kidnapped or stolen away, or a freeman who has been taken by robbers and reduced to slavery, is not a slave. And a citizen of the United States, taken captive by barbarians and reduced to slavery, does not lose either his political or civil rights on that account.

166. By the natural law all men are created free,²⁵ and no man can be reduced to slavery but by virtue of some law. The general government of the United States did not sanction or establish slavery: the state governments, where that institution existed, have authorized it by law; for without such authority it had no existence whatever.²⁶

167. It is a maxim of law, that the child follows the condition of the mother, *partus sequitur ventrem*.²⁷ The child of a female slave is therefore a slave, whoever may have been its father.²⁸ But the child of a female slave, born in a free state where slavery is not recognized by law, is free.²⁹

168. A slave has no political nor any civil rights, while subject to his condition of slavery.³⁰ But in a state where slavery is not allowed, a man, who is a slave by the laws of his domicil, may maintain an action in his own name for a personal tort committed against him within that jurisdiction;³¹ for by the law of nations no state is bound to recognize slavery in another state.³²

The Constitution of the United States³³ provides that "no person held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on the claim of the party to whom such service or labor may be due." Interpreted by the common rules of construction, by which alone it must be understood, the clause is not clear of difficulty; but as the supreme court has given it a judicial construction, the subject must now be considered at rest.

Another important consideration has been urged, since this subject has unhappily agitated our country, whether congress possess any power to legislate upon the subject. From a very early period of our history, and when many of those who formed the constitution were in the councils of the nation, a law was passed by congress to give this clause its full operation. The act of 12th February, 1793, s. 3, was passed; and a still more stringent law was enacted

²⁵ Declaration of Independence.

²⁶ *Jones v. Vanzandt*, 2 McLean, C. C. 596.

²⁷ Code 8, 25, 1.

²⁸ By the Roman law, the child of a female slave was free, if, at the time of the conception, the mother was free; or if, being a slave, she was manumitted during the pregnancy, and again became a slave before the child's birth. Justinian, Inst. lib. 1, t. 4. In Kentucky, it was held that when a testator by his will directed that a female slave should be free at a certain age, her children, born after the death of the testator, and before the period arrived, were held to be slaves. *Ned v. Beale*, 2 Bibb, Ky. 298. In New Jersey, where a testator directed his executors to sell a slave for fifteen years, and "at the end of that time to be free," she was considered free from the time of the sale; and a child born afterwards, and before the end of the fifteen years, was adjudged to be free also. *State v. Anderson, Coxe*, N. J. 36. In Pennsylvania, it has been held that when a pregnant slave absconded from another state, and gave birth to a child in Pennsylvania, the child was free. *Commonwealth v. Holloway*, 2 Serg. & R. Penn. 305; *Benjamin v. Armstrong*, 2 Serg. & R. Penn. 392.

²⁹ *Jackson v. Bullock*, 12 Conn. 38.

³⁰ *Amy v. Smith*, 1 Litt. Ky. 326; *Lenoir v. Sylvester*, 1 Bail. So. C. 633; *Catiche v. The Circuit Court*, 1 Miss. 608; *Vincent v. Duncan*, 2 Miss. 214; *Hall v. Mullin*, 5 Harr. & J. Md. 190; *The State v. Hart*, 4 Ired. No. C. 246; *Gist v. Toohey*, 2 Rich. So. C. 424; *Jenkins v. Brown*, 6 Humphr. Tenn. 299.

³¹ *Polydore v. Prince*, Ware, Dist. Ct. 402.

³² *Prigg v. Pennsylvania*, 16 Pet. 539.

³³ U. S. Const. art. 4, s. 2.

by congress in 1850, to enable the owner of a fugitive from labor to recover him when he has fled into a free state.³⁴

169. Slavery in the United States is now a matter of history. The rebellion of the southern states in 1861 inevitably culminated in its abolition, though at first by gradual steps. In 1861 it was provided that any slave employed by his owner in any work against the United States should be free.³⁵ In 1862 slavery was abolished in the District of Columbia, compensation being given to loyal owners,³⁶ and the state of West Virginia was admitted into the Union upon abolishing slavery.³⁷ In the same year slavery was prohibited in the territories of the United States,³⁸ and the slaves of persons engaged in rebellion were declared free.³⁹ On the 22d of September, 1862, the president issued a proclamation declaring that all slaves in states which should be in rebellion on the 1st day of January, 1863, should become free, and on that date another proclamation was issued designating the states then in rebellion. This proclamation included all the states in which slavery then existed, except Delaware, Maryland, Kentucky, Tennessee, Missouri, West Virginia, and parts of Louisiana and Virginia. On the 1st day of February, 1865, congress proposed an amendment to the constitution providing that neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. This amendment having been duly ratified has become a part of the constitution.⁴⁰

170. *Manumission*, which is an express act by the owner of the slave by which the latter is rendered free, has the effect to change the state of the slave, and he then acquires all the rights of a free man of color.

A slave may acquire his freedom, not only with the consent of his owner as above-mentioned, but by implication, or by operation of law alone, as when a master takes his slave into a free state for the purpose of continued residence; or by a continued residence there, whatever may have been his intention, beyond the time allowed by the laws of such state, the slave becomes free.

He may also be manumitted by the last will of his master.

³⁴ It is not a little singular, that among the Romans there were laws not dissimilar to the acts of congress mentioned in the text. They declared a slave as a fugitive who stayed away from the house of his master with an intention of running away and escaping from his search: the slave was not considered a fugitive who had only had the design of running away, even though he should have divulged his intention—he must have executed it. Dig. 21, 1, 17 and 43; Dig. 50, 16, 225; Code, 6, 1, 1. After the slave became a fugitive, if any one received him into his house in order to shelter him from the anger of his master, he became liable to an action, and the master could recover damages in an action called *de servo corrupto*. The law treated him who concealed a fugitive slave, in order to cause his evasion, with much severity: *Is qui fugitivum celavit, fur est*. Dig. 11, 4, 1. By a *senatus consultum*, authority was given to every military man, or even an individual, to enter into the lands of senators and other persons to search for fugitive slaves; and, by another law, the houses of the prince himself might be examined to search for them. But in order not too much to infringe on the rights of individuals, the persons who made the searches were to be authorized by the president of the tribunal, who would give an injunction, and send a serjeant to obtain access to the house intended to be examined. Pothier, Pand. lib. 11, tit. 4, art. 1, n. 5. When found, the slave was to be brought before a magistrate, whose duty it was to deliver him to his master, if the latter's claim was established. In the provinces, when arrested, the slave was carried before the president of the province or the proconsul, who decided as to the right of the supposed master. Pothier, Pand. lib. 11, 4—2, 7.

³⁵ Act of Congr. Aug. 6, 1861; 12 Stat. 319.

³⁶ Act of Congr. April 16, 1862; 12 Stat. 376.

³⁷ Act of Congr. Dec. 31, 1862; 12 Stat. 633.

³⁸ Act of Congr. June 19, 1862; 12 Stat. 432. Special acts were passed for Arizona and Idaho; Feb. 24, 1863; 12 Stat. 664; March 3, 1863; 12 Stat. 809.

³⁹ Act of Congr. July 17, 1862; 12 Stat. 590.

⁴⁰ U. S. Const. amend. 13.

171. A *white person* is one who is of the Caucasian race, without any mixture of African or aboriginal blood, or at most not a fourth part of such blood.⁴¹ In the southern states, when a question as to the quantity of African blood in a person arises, it is left to the jury to find it as a matter of fact.⁴²

The acts of congress⁴³ which authorize the naturalization of aliens, confine the description of such aliens to free white persons. And many of the state constitutions require, as one of the qualities of a citizen or elector, that he shall be white.

A rule was adopted in the slave states that color is presumption of slavery;⁴⁴ but in the free states this rule would probably have been reversed, because there the presumption is that all men are free, and he who would rebut the presumption must establish the contrary fact.⁴⁵

172. In some countries a distinction exists between noblemen and plebeians.

A *nobleman* there is one to whom some special privileges are granted, generally at the expense of the more deserving classes of the people.

A *plebeian* is one who belongs to the common people.

Happily, in this country, the order of nobles does not exist: the Constitution of the United States provides that "no title of nobility shall be granted by the United States."⁴⁶ And no state shall "grant a title of nobility."⁴⁷

173. *Sanity* is the state of a person who has a sound mind; one who in his actions conforms to those of the bulk of mankind; one whom the law regards as capable to perform all civil duties, and to be responsible for his acts

Sanity is always presumed.

Insanity is that state which induces a continued impetuosity of thought, which, for the time being, unfits a man for judging and acting in relation to the affairs of life with the composure requisite for the maintenance of the social relations; one who is deprived of the use of reason, after having attained the age when he ought to have it, either in consequence of a defect at his birth, or because of some accident which has happened since.⁴⁸

This state is never presumed, but if once proved to exist, it will be presumed to have continued.

The insane man is deprived of his political and civil rights. He is represented by a guardian, curator, or committee.⁴⁹

174. *Infamy*, in a general sense, is the condition of a person who is regarded with contempt and disapprobation by the generality of men, on account of his vices.⁵⁰ But, in a legal sense, it is the state of one who has been lawfully convicted of a crime, followed by a judgment,⁵¹ by which he has lost his honor.

⁴¹ Gentry v. McMinnis, 3 Dan. Ky. 382.

⁴² State v. Davis, 2 Bail. So. C. 558.

⁴³ Except the act of July 17, 1862; 12 Stat. 597.

⁴⁴ Davis v. Curry, 2 Bibb, Ky. 238; Burke v. Joe, 6 Gill & J. Md. 136; Rawlings v. Boston, 3 Harr. & M'H. Md. 139. The same rule prevailed in New Jersey, 3 Halst. N. J. 275.

⁴⁵ The presumption of law is in favor of freedom. State v. Dillahun, 3 Harr. Del. 551; State v. Griffin, 3 Harr. Del. 559; Kinney v. Cook, 4 Ill. 232.

⁴⁶ U. S. Const. art. 1, s. 9, n. 7.

⁴⁷ U. S. Const. art. 1, s. 10, n. 10.

⁴⁸ Domat, Lois Civ. Liv. 2, s. 1, n. 11; Ray, Med. Jur. § 24.

⁴⁹ The rule that sanity is to be presumed calls for no special remark except where it is set up as a defence in a criminal trial. Here there are two conflicting presumptions; on the one hand the prisoner is presumed to be innocent, and on the other to be sane. The doctrine now held is that the jury are authorized to find the prisoner insane if the preponderance of evidence is in favor of his insanity. Commonwealth v. Rogers, 7 Metc. Mass. 500; Commonwealth v. Andrews, Mass. Dec. 1868. In some cases the jury are instructed to give the prisoner the benefit of any doubt. People v. McCann, 16 N. Y. 58.

⁵⁰ Woolffius, Inst. § 148.

⁵¹ State v. Valentine, 7 Ired. No. C. 225; United States v. Dickinson, 2 McLean, C. C. 325; 1 Ashm. Penn. 57.

The crimes which render a person infamous are, treason;⁵² felony;⁵³ frauds; which come within the notion of the *crimen falsi* of the Roman law, as perjury and forgery,⁵⁴ piracy,⁵⁵ swindling and cheating,⁵⁶ barratry,⁵⁷ and bribing a witness to keep away.⁵⁸

The consequences of infamy are the loss of political rights and incapacity to testify as a witness.⁵⁹

Officers of the United States who are removed from office by impeachment and conviction may be disqualified to hold any office of honor, trust or profit under the United States,⁶⁰ and the same punishment may be imposed on officers of the army by courts martial for certain offences.

175. *Birth* is the act of being wholly brought into the world; the fact of having acquired an existence independent of one's mother. A child born differs in many respects from one *in ventre sa mère*.

But unless the child be born alive, it is not a birth, but a *miscarriage*. The consequence is, that such child neither acquires nor transmits to others any rights.⁶¹

Persons who are born are generally entitled to all the rights which are exercised by others except those which are gained by age, and are the objects of the care of the law.

One who is not born, technically called an infant *in ventre sa mère*, is treated as a man, but this is only in the hope of his being born alive.

176. The rights of a child *in ventre sa mère* are numerous:

For all beneficial purposes to himself, such a child is considered as born.⁶² But a stranger can acquire no title through him, unless he be afterwards born alive.

An estate may be limited to his use.⁶³

He may have a distributive share of an intestate property.⁶⁴

May take a devise of lands.⁶⁵

Takes under a marriage settlement a provision made for children living at the death of the father.⁶⁶

May be appointed executor, at common law.⁶⁷

A guardian may be assigned to him.⁶⁸

Others may act on his behalf.⁶⁹

⁵² 1 Greenleaf, Evid. § 373; 5 Mod. 16, 74.

⁵³ Coke, Litt. 6.

⁵⁴ Coke, Litt. 6; *People v. Whipple*, 9 Cow. N. Y. 707; 1 Greenleaf, Evid. § 373.

⁵⁵ 2 Rolle, Abr. 886.

⁵⁶ Fort. 209.

⁵⁷ *Rex v. Ford*, 2 Salk. 690.

⁵⁸ Fort. 208.

⁵⁹ 1 Greenleaf, Evid. §§ 372, 376.

⁶⁰ U. S. Const. art. 1, s. 3, n. 7.

⁶¹ 1 Chitty, Gen. Pr. 35, n. z.

⁶² Coke, Litt. 36.

⁶³ 1 Sharswood, Blackst. Comm. 130.

⁶⁴ 1 Ves. Ch. 181.

⁶⁵ *Wallis v. Hodson*, 2 Atk. Ch. 117.

⁶⁶ *Miller v. Turner*, 1 Ves. Ch. 85.

⁶⁷ Bacon, Abr. *Infancy*, B.

⁶⁸ 1 Sharswood, Blackst. Comm. 130.

⁶⁹ *Beeton v. Darkin*, 2 Vern. Ch. 170.

CHAPTER II.

OF CORPORATIONS.

- 178. Definition.
- 179. Creation of corporations.
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 - 185. Quasi-corporations.
- 187-193. Powers and incapacities of corporations.
 - 188. Powers of corporations.
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 - 194. Dissolution of corporations.
 - 195. Foreign corporations.

177. Having considered the rights and duties of natural persons, the next object of our inquiries will be to examine the law as it relates to artificial persons, or corporations. This will be done by taking a view, of what is a corporation; how it is created; the kinds of corporations; of their powers; and how they are dissolved.

178. A *corporation* is an intellectual body politic, created by law, composed of one or more persons who act under a common name, are endowed with perpetual succession, and with various other powers, by its charter or the law which created it, and which, for certain purposes, is considered as a natural person. It is, as is well observed by Chief Justice Marshall, "an artificial being, invisible, intangible, and existing only in contemplation of law."¹

A corporation created by and doing business in a particular state, is to be deemed, to all intents and purposes, as a person, an inhabitant of that state, and for the purposes of its incorporation as a citizen of that state. The residence of its stockholders does not affect in any way the citizenship of the corporation.²

179. Unlike the law of England, which allows the existence of corporations by implication, by prescription, or by the express or implied consent of the king, corporations by our law owe their origin to a legislative act, called a charter; and this is the source of all their power.³

"Being the mere creature of law," says the late learned Chief Justice Marshall, in the case already cited, "it possesses only those properties which

¹ *Dartmouth College v. Woodward*, 4 Wheat. 626.

² *Louisville R. R. v. Letson*, 2 How. 558; *Ohio R. R. v. Wheeler*, 1 Black, 286; *Covington Bridge v. Shepherd*, 20 How. 227; *Marshall v. Baltimore R. R.* 16 How. 314; *Regina v. Arnaud*, 9 Q. B. 806.

³ *Head v. Providence Ins. Co.* 2 Cranch, 127; 4 Wheat. 636. The statement that a corporation exists by prescription only means that its foundation dates from a time beyond memory, and its existence furnishes a legal presumption that its creation was legal. And in this country the existence of a corporation for a long time is good evidence in default of other, that it was legally incorporated. *Dillingham v. Snow*, 7 Mass. 547; *Bow v. Allentown*, 34 N. H. 351. As a matter of fact, however, there will rarely be a case of a corporation existing otherwise than by a charter, which is within the memory of man and can be proved.

the charter of its creation confers upon it, either expressly or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created. Among the most important are immortality, and, if the expression may be allowed, individuality; properties by which a perpetual succession of persons are considered as the same, and may act as a single individual. They enable a corporation to manage its own affairs, and to hold property without the perplexing intricacies, the hazardous and endless necessity of perpetual conveyance, for the purpose of transmitting it from hand to hand. It is chiefly for the purpose of clothing bodies of men, in succession, with these qualities and capacities, that corporations were invented and are in use."

180. Joint-stock companies and partnerships are not corporations, unless actually incorporated. In these cases the individual members are parties to every contract, and do not lose their individuality in that of the social body.⁴

181. Corporations have been variously classed, according to the views or skill of different writers. They are not unfrequently divided into public, or such as relate to towns, cities, counties, and parishes, existing for public purposes;⁵ private, or such as concern matters not of a public nature. Private corporations, when considered as to their object, are ecclesiastical, when they relate to the affairs of the church; or lay, when they affect other persons; and the latter are divided into civil, when they have for their object the promotion of something of a temporal nature; and eleemosynary, when they are constituted for the perpetual distribution of free alms, or the bounty of the founder, as he has directed. In this class are included hospitals for the relief of the poor, and colleges for the promotion of learning.⁶ When considered as to the number of members, they are sole or aggregate. A sole corporation consists of one person only, or his successors. Few of these are to be found in the United States, though some exist.⁷ Aggregate corporations consist of two or more persons.

All these may be reduced to four classes, namely: political; public and not political; private; quasi-corporations.

182. *Political* corporations are those which have principally for their object the administration of the United States, of some state of the Union, or some portion of the same, and to whom the powers of the government, or a part of such powers, have been delegated to that effect.

Nations or *states* are denominated bodies politic; they have their affairs and interests to deliberate on in common. They thus become moral persons, having an understanding and will peculiar to themselves, and are susceptible of obligations and laws.⁸ In this extensive sense, the United States of America may be termed a corporation;⁹ and so may each of the states of the Union singly. To this class belong all municipal corporations, as counties, townships, districts, cities, boroughs and the like.

183. *Public* corporations of a *nature* which are not political, are those which are composed for the benefit of the government alone, but if individuals have a part in them they are private: for example, if a bank were incorporated for the use of the government, and there were no other stockholder, it would

⁴ See *Ernst v. Bartle*, 1 Johns. Cas. N. Y. 819.

⁵ *Bonaparte v. Camden and Amboy R. R.* 1 Baldw. C. C. 223.

⁶ *Dartmouth College v. Woodward*, 4 Wheat. 518, 668.

⁷ *Brunswick v. Dunning*, 7 Mass. 447; *Weston v. Hunt*, 2 Mass. 501; *Jansen v. Ostrander*, 1 Cow. N. Y. 670.

⁸ Vattel, Law of Nat. l. prel. § 1, 4.

⁹ 1 Brock. C. C. 177; per Iredell, J. 3 Dall. 447; *United States v. Tingey*, 5 Pet. 115; *United States v. Baker*, Paine, C. C. 156.

be a public corporation ; but if any private individual held a part of the stock, it would be a private corporation.¹⁰

When a state becomes a stockholder in a corporation, this does not confer any additional privileges on the corporation, but it may be sued although the state cannot.¹¹

184. All corporations, which are neither political nor public, are *private corporations*. They are divided into ecclesiastical and lay.

Ecclesiastical or religious corporations are those whose principal object is to establish and regulate congregations of different religious denominations. They are established under the statutes of the different states and are generally authorized to hold a limited amount of property.

Lay corporations are divided into eleemosynary and civil. The former are instituted for the purpose of charity, such as hospitals. Colleges come into this class.¹²

Civil corporations are those which are created for purposes of temporal profit, as railroads, manufactories, banks, insurance companies, etc. This is the most numerous class. They may subserve important public interests as in the case of railroads and gas companies, but this does not make them public corporations.

Private corporations give a right to the corporators of which they cannot be deprived without their consent, unless the act of corporation or charter reserves to the legislature the power to do so ; and in this respect they differ from public or political corporations, because in the latter no vested right is violated by the change, and the legislature may at pleasure alter the provisions of their charter or constitution.

185. By *quasi-corporations* is understood a municipal society or body of men, who, though not vested with the general powers of a corporation by any express law, are yet recognized by statute or immemorial usage, and the body they compose is a person or an aggregate corporation, with powers and duties which may be enforced, and privileges which may be maintained by suits at law. Such bodies are considered *qua* corporations, with limited powers, coëxtensive with the duties imposed upon them by statute or usage ; but restrained from a general use of authority, which belongs to those metaphysical persons by common law.

186. Among quasi-corporations may be classed towns, townships, counties, parishes, hundreds, and other political divisions, which are established without an express charter of incorporation ; commissioners of a county, supervisors of highways, overseers of the poor, loan officers of a county, and the like, who are invested with corporate powers *sub modo*, and for a few specified purposes only.¹³ But not such a body as the General Assembly of the Presbyterian Church.¹⁴

The joint-stock companies in England which fill the place supplied by private corporations in this country, are quasi-corporations.¹⁵

187. We will now consider first the rights, powers, and privileges of a corporation and by whom they are to be exercised ; and second its incapacities.

¹⁰ *Bank of U. S. v. Planters' Bank*, 9 Wheat. 907.

¹¹ *Turnpike Co. v. Wallace*, 8 Watts, Penn. 316; *Seymour v. Turnpike Co.* 10 Ohio, 476; *Moore v. Canal*, 7 Ind. 462.

¹² *Dartmouth College v. Woodward*, 4 Wheat. 681.

¹³ *Trustees of Schools v. Tatman*, 13 Ill. 27; *Carmichal v. Trustees*, 4 Miss. 84; *Commissioners of Roads v. McPherson*, 1 Speer, So. C. 218; *North Hempstead v. Hempstead*, 2 Wend. N. Y. 109; *School District v. McLoon*, 4 Wisc. 79; *Clarke v. School Dist.* 3 R. I. 199.

¹⁴ *Commonwealth v. Green*, 4 Whart. Penn. 531; *Angell, Corp.* 25; 2 Kent, Comm. 224.

¹⁵ *Harrison v. Timmins*, 4 Mees. & W. Exch. 510; *Wordsworth, Joint Stock Cos.* 41, 175.

188. A corporation is, for all the purposes of its creation, to be considered as a person, capable of performing a variety of acts for the promotion of the object of its creation, and sanctioned by the charter. Among these are—

To use a *common seal*, for the purpose of authenticating all its solemn acts. Formerly a corporation could bind itself only by seal.¹⁶ But this doctrine is now repudiated,¹⁷ and an aggregate corporation may contract, unless restrained by its charter, by the intervention of agents duly authorized by a corporate vote of the board of managers or directors;¹⁸ and even an implied contract will be enforced against a corporation, but such implied contract must be within the scope of its authority.¹⁹ The seal is required only in those cases where an individual must use one.

A corporation may enter into *contracts*: it has the same capacity to buy and sell that an individual has who is *sui juris*, unless restrained by its charter.²⁰ They are generally restricted as to the quantity of land they may hold.²¹ When authorized to hold lands they may use them as individuals, and may, therefore, sell them or mortgage them to secure debts due by them.²²

A corporation is an *intellectual being*, different and distinct from all persons who compose it. It has individuality. The estate or rights of the corporation belong completely to the body, and not to the individuals who compose it; nor can any one of them dispose of any such estate or right, or of any part of it. In this respect the right to the property is different from rights held in common. What is due to a corporation is not due to any of the individuals who compose it, and debts due by such corporation are not due by the individual members.

It has *uninterrupted succession*. As long as the charter endures it remains the same, although all its members may be changed. As to its duration it is either unlimited, when it becomes immortal, or it is limited, and then it expires at the time appointed by its charter. It may, however, be dissolved by various other means.²³

A corporation has a *corporate name*, which is always fixed by the charter, and in this name it makes all its contracts, and sues and is sued.²⁴ But if in a contract with a corporation its name be so given as to distinguish it from all other corporations, it is sufficient to support an action in the true corporate name.²⁵

For the regulation of their affairs in detail, corporations are authorized to make *by-laws* or rules and ordinances for their government. When the power to make by-laws is expressly conferred by the charter, it must be exercised by the persons to whom it is given, and in the manner pointed out.²⁶ When the charter is silent as to the persons who shall make by-laws, the power resides in

¹⁶ 1 Sharswood, Blackst. Comm. 475.

¹⁷ Chestnut Hill Turnpike v. Rutter, 4 Serg. & R. Penn. 16; Rumford v. Wood, 13 Mass. 199; Bank of U. S. v. Dandridge, 12 Wheat. 64.

¹⁸ Bank of Columbia v. Patterson, 7 Cranch, 799.

¹⁹ Canal Bridge v. Gordon, 1 Pick. Mass. 297; Stone v. Berkshire Soc. 14 Vt. 86; Bates v. Bank of Alabama, 2 Ala. 451.

²⁰ Reynolds v. Starks, 5 Ohio 205.

²¹ Where a corporation is limited as to the amount of income it can receive from lands, this limitation does not apply to an increase beyond that amount arising from the increased value of the lands. Humbert v. Trinity Church, 24 Wend. N. Y. 587; Harpending v. Dutch Church, 16 Pet. 492.

²² Gordon v. Preston, 1 Watts, Penn. 135; 5 Wend. N. Y. 590

²³ Beyond, 194.

²⁴ Porter v. Neckervis, 4 Rand. Va. 359.

²⁵ Hagerstown Turnpike v. Creeger, 5 Harr. & J. Md. 122; Alloway's Creek v. String, 5 Halst. N. J. 323; Berks v. Myers, 6 Serg. & R. Penn. 16; Bacon, Abr. Corporation.

²⁶ Kyd, Corp. 102.

the members of the corporation at large.²⁷ When a by-law is made to conflict with the Constitution of the United States or its laws, or with the constitution or laws of the state, it is void. And so is an unreasonable law,²⁸ or one which operates retrospectively,²⁹ or one which is not requisite for the good government and support of the affairs of the corporation.³⁰ But a by-law may be good in part and void for the rest.³¹

By-laws are in general binding on the members of the corporation only,³² but the legislature may authorize the corporation to make by-laws binding upon others.³³

189. A corporation is usually composed of many members, or persons who have a right to act in the affairs of the corporation, like any others who have an interest in the same. In charitable, and other civil or religious corporations, not of a pecuniary nature, each member has an equal right, and the majority rule; but in pecuniary corporations, for example, a bank, the members vote by representing the interest they have in it, which is called their stock, and not by representing their persons. In such cases the capital is divided into shares, and every one who is a shareholder is a member of the corporation.

190. Great inconvenience would follow if all the members of a numerous corporation were required to be present, whenever business was transacted in which it was concerned. To obviate this, the charter usually provides that there shall be elected a number of the corporators, who shall have the power to manage the affairs of the corporation, and these are called by the various names of managers, directors, syndics, committees, and the like.

These officers constitute themselves into a separate body, called a board of managers, etc., have each an equal voice, and, in the management of the affairs of the corporation, a majority rule without any regard to the amount of stock they hold individually; and, when they act within the limits of their powers, bind the corporation. Agents and attorneys, acting within the powers delegated to them, when the board have a right to delegate such powers, bind the corporation as if the act had been that of the board.

191. Managers and other officers may be removed from their office by the members of the corporation, for cause. This power, which is called the power of *amotion*, is incident to every corporation.

192. *Disfranchisement* is the expulsion of a member, and by it he ceases to be one of the corporation. Where a corporation owns property, it cannot expel a member unless such a right is expressly given by its charter.

In the case of charitable and religious corporations, the Supreme Court of Pennsylvania have decided, that the corporation may expel a member in certain cases, viz.:

When a member commits an infamous offence, rendering him unfit for the society of honest men: in such case there must be a previous conviction at law.

When the offence is against the party's duty as a corporator: in this case, he must be expelled on trial, after being duly summoned, on conviction by the corporation.

²⁷ Harr. & G. Md. 324; 4 Burr. 2515, 2521; 6 Brown, Parl. Cas. 519.

²⁸ Commonwealth v. Worcester, 3 Pick. Mass. 473.

²⁹ Howard v. Savannah, T. W. P. Charlt. Ga. 178.

³⁰ Comm. v. St. Patrick's Society, 2 Binn. Penn. 448.

³¹ Rogers v. Jones, 1 Wend. N. Y. 260.

³² Worcester v. Essex Bridge, 7 Gray, Mass. 457; Palmyra v. Morton, 25 Mo. 593; Mechanics' Bank v. Smith, 19 Johns. N. Y. 115.

³³ Soper v. Harvard College, 1 Pick. Mass. 177; Cummings v. Webster, 43 Me. 192.

When the offence is of a mixed nature, against the party's duty as a corporation, and also against the law of the land.³⁴

These rules, however, do not apply to corporations where the members are stockholders. Where a corporation is a mere trustee of a charity, a court of equity will appoint a new trustee though it cannot disfranchise a member of the corporation.³⁵

193. Corporations being intellectual persons, they are subject to various kinds of incapacities, some of which are inherent from their nature, others are established by law.

A corporation *cannot commit a crime*, nor a misdemeanor, though its officers may, while acting on its behalf, do both; they alone will be responsible.³⁶ Nor can such a body commit any forcible injury, as trespass.

It was formerly said that a corporation could not be sued for a tort; but it is now held that the tortious acts of its agents are the acts of the corporation, and the suit may be brought against the corporation.³⁷

For acts of omission by its agents the corporation is responsible, for this is clearly a neglect of corporate duty by the corporation.³⁸ A corporation may be sued for trespass.³⁹

It cannot be a *witness*, nor do any personal act: when it is sued, and it must make an answer in chancery, such answer must be made under the corporate seal.⁴⁰

Having no other than an ideal existence, a corporation cannot *commit a battery*, nor bring an action for an assault and battery; it cannot be imprisoned.

A corporation derives all its power from its charter; it is of course incapable to perform any act forbidden by it, or which it does not authorize.

194. A corporation legally established, may dissolve in the following ways:

By *efflux or lapse of time*. When the charter limits a time for the existence of the corporation, it is dissolved as soon as the period arrives.

By *surrender*. A corporation may yield up all rights to its charter, and surrender it to the legislature from whom it emanated;⁴¹ and if the rights of third persons are to be affected by it, the surrender must be accepted by the legislature.⁴² But the officers of a corporation, composed of several integral parts, cannot dissolve the corporation, without the full assent of the great body of the society.⁴³

It may be doubted whether a majority of a corporation can surrender its charter without some express provision. In some states the law provides for a dissolution by courts having equity jurisdiction upon the petition of a majority.⁴⁴

By a *legislative act*. A public corporation, when no individual has any

³⁴ *Commonwealth v. St. Patrick's Soc.* 2 Binn. Penn. 448; *Commonwealth v. Guardians*, 6 Serg. & R. Penn. 469.

³⁵ *Neall v. Hill*, 16 Cal. 145; *Verplanck v. Mercantile Ins. Co.* 2 Paige Ch. N. Y. 438.

³⁶ *Commonwealth v. Swift Run Gap Turnp. Co.* 2 Va. Cas. 362.

³⁷ *Brown v. So. Kennebec. Agr. Soc.* 47 Me. 275; *New York Tel. Co. v. Dryburg*, 35 Penn. St. 298.

³⁸ *Conger v. Chicago, R. R.* 15 Ill. 366; *Pittsburgh v. Grier*, 22 Penn. St. 54; *Smoot v. Wetumpka*, 24 Ala. 112.

³⁹ *Edwards v. Union Bank*, 1 Fla. 136; *Whiteman v. Wilmington R. R.* 2 Harr. Del. 514.

⁴⁰ *Bronson v. La Crosse R. R.* 2 Wall. 302; *Fulton Bank v. New York Canal Co.* 1 Paige, Ch. N. Y. 311.

⁴¹ *Mumma v. Potomac Company*, 8 Pet. 281; *Penobscot Co. v. Lamson*, 16 Me. 224; *Mobile R. R. v. State*, 29 Ala. 573.

⁴² *Revere v. Boston Copper Co.* 15 Pick. Mass. 351; *Enfield Bridge v. Conn. River Co.* 7 Conn. 45.

⁴³ *Smith v. Smith*, 8 Des. Eq. So. C. 557.

⁴⁴ *Mass. Gen. St. ch. 68 § 35*; *Pratt v. Jewett*, 9 Gray, Mass. 34.

vested interest in it, may be dissolved by an act of the legislature; but private corporations, where such private rights are vested, cannot be dissolved by a statute, so as to deprive any one of a vested right, unless the power so to dissolve it has been reserved in the charter.⁴⁵ This wise provision is now generally contained in new charters.

By *death* of all the members of a corporation. But this does not apply to pecuniary corporations, as for example, a bank; in that case the rights of the corporator vest in his executors or administrators, who then become members.⁴⁶

By *forfeiture*. A corporation may, by wilful non-feasance or mal-feasance, forfeit its franchises, which may be seized by the state on a judgment upon an information filed and prosecuted by the state.⁴⁷ But such prosecution can be only by the state through its agents.⁴⁸ The remedy is by *scire facias* or *qup warranto*.

At common law upon the dissolution of a corporation its property reverted to the grantor or to the state, and its debts were extinguished. This rule is not applicable in this country to moneyed corporations, but upon their dissolution their property constitutes a trust fund pledged to the payment of their debts.⁴⁹

195. It is a rule of law, founded on reason, that no state has a right to extend the jurisdiction of its laws beyond its own territory. The states of the American Union are for many purposes considered as foreign to each other, and the jurisdiction of the laws of one of them can extend into the others only in those cases where the laws of a foreign country, or one not a member of the Union, become the rule for deciding controversies; but by the rules adopted among themselves, on the principle of comity, the laws of one of the states will be executed, or have force in another.

Every corporation erected by the laws of a foreign state, taken in this sense, is a foreign corporation. Such a corporation cannot merely by virtue of its charter claim a right to carry on business in another state, as, for example, a corporation created by the laws of Massachusetts, to carry on manufacturing or banking, could not establish itself in Pennsylvania, and there pursue the object of its creation, because the state of Massachusetts cannot extend its laws over Pennsylvania: but, by the comity of nations, a corporation established in one state may sue in another; and it may sue in a court of equity, as well as at law.⁵⁰

⁴⁵ *People v. Jackson R. R.* 9 Mich. 285; *State v. Noyes*, 47 Me. 189; *Bruffett v. Great Western R. R.* 25 Ill. 353.

⁴⁶ *Boston Mfy. v. Langdon*, 24 Pick. Mass. 52.

⁴⁷ *Terret v. Taylor*, 9 Cranch. 43; *Commonwealth v. Commercial Bank*, 28 Penn. St. 383; *Aurora Co. v. Holthouse*, 7 Ind. 59.

⁴⁸ *Commonwealth v. Union Ins. Co.* 5 Mass. 230; *Lehigh Co. v. Lehigh Co.* 4 Rawle, Penn. 9; *Heard v. Talbot*, 7 Gray, Mass. 120; *State v. Mississippi R. R.* 20 Ark. 495; *Dyer v. Walker*, 40 Penn. St. 157; *Vermont & Can. R. R. v. Vermont Cent. R. R.* 34 Vt. 57.

⁴⁹ *Curran v. Arkansas*, 15 How. 312; *Bacon v. Robertson*, 18 How. 480; *State v. Bailey*, 16 Ind. 46.

⁵⁰ *Silver Lake Bank v. North*, 4 Johns. Ch. N. Y. 370; *Bank of Marietta v. Pindalf*, 2 Rand. Va. 465; *Clarke v. New Jersey Co.* 1 Stor. C. C. 531; *British Co. v. Ames*, 6 Mete. Mass. 391; *Savage Man. Co. v. Armstrong*, 24 Me. 34; *Day v. Essex Bank*, 13 Vt. 97; *Bank of Washtenaw v. Montgomery*, 3 Ill. 422; *Guaga Iron Co. v. Dawson*, 4 Blackf. Ind. 292; *Libbey v. Hodgdon*, 9 N. H. 394; *Bank of Augusta v. Earle*, 13 Pet. 519; *Lucas v. Bank of Georgia*, 3 Ala. 147. It seems more in accordance with the general current of opinion and authority to state that a foreign corporation may, in the absence of legislation forbidding such a course, carry on its business in a state other than that in which it is chartered. This is done, in any case, under the implied assent of the state in which the business is carried on, and such assent is of course revocable at the will of the state in which the business is exercised. Most of the states have by statutes imposing taxes or regulating the means of suing process, or in some similar manner recognized the transaction of business by foreign corporations within their limits as valid, though it is doubtful whether this implied recognition authorizes the holding of land.

CHAPTER III.

CIVIL RIGHTS.

- 196. Constitutional rights.
- 197. Political rights.
- 198-219. Civil rights.
- 199-216. Absolute rights.
 - 202. Personal security.
 - 208. Personal liberty.
 - 209. Liberty of person.
 - 213. Liberty of thought.
 - 215. Liberty of conscience.
 - 216. Right to enjoy property.
- 217-219. Relative rights.
- 220-222. Loss of civil rights
 - 221. Loss by expatriation.
 - 222. Loss by judicial condemnation.
- 223. Evidence of civil state.
- 226-233. Domicil.
 - 228. Domicil of origin.
 - 229. Domicil acquired.
 - 233. Domicil of choice.
- 234. Absentees.

196. Whatever may be the theories which have been adopted in other countries in order to establish a civil state, or the combination of all the power of a society of men under a particular direction, in the United States we need not have any recourse to them, because the foundation of our government is a compact or agreement of the people establishing the civil state, the constitution.

The first law of the civil state is the establishment of a public power to cause the execution of the laws, which shall not be exercised by any individual of the society; he is not permitted to do himself justice, but must appeal in all cases when required to the depositories of the public authority, or to the power of all for the surety of all, whenever he can have recourse to it. Hence the maxim that all the people are under the protection of the law.

All rights flow from the same source, the whole of the laws which concern the state; but they may be divided conveniently into political rights and civil rights.

197. *Political rights* consist in the faculty of participating directly, either in the exercise or establishment of the public power, or the public functions. These rights are fixed by the constitution, and have been considered in a former part of this work.¹

198. *Civil rights* are those which have not for their object the exercise or the establishment of public power or functions. These consist in the power of acquiring and enjoying property, of exercising paternal and marital authority, and the like. Every one, unless lawfully deprived of them, is in the enjoyment of his civil, but not of his political rights. An alien, for example, has no political, though he is in the full enjoyment of his civil rights.

Civil rights are divided into absolute and relative.

¹ Prelim. Book, ch. 2.

199. *Absolute rights* are those which belong to each man in particular, considered as an individual, independently of the relations which he has with other men, or the other members of society. Liberty, for example, is an absolute right.

By absolute rights, in a primitive and strict sense, must be understood those which man holds from nature; those which he enjoyed in his natural, independent state, and which he continues to enjoy in his civil state; for the very object of civil society is to maintain him in those absolute rights which he derives from the immutable laws of nature.²

200. In entering into society, man yields up a part of his natural independence in exchange for the advantages he receives from society; and in consideration of those advantages he becomes bound to obey the laws which the majority have established. This species of constraint is far preferable to the ferocious liberty of a state of nature; for if he is restrained, others are also prevented from doing him any injury.

201. *Civil liberty* is the power to do whatever is permitted by the constitution of the state, or the laws of the land. It is no other than natural liberty, so far restrained by human laws, and no further, operating equally upon all the citizens, as is necessary and expedient for the general advantage of the public.³ Thus every law which prevents us from injuring our fellow-citizens, increases and assures civil liberty, though it may decrease natural freedom. On the contrary, every law which controls our actions unnecessarily, in relation to things purely indifferent, is a law against liberty, unless, upon the whole, it proves a benefit to society at large.⁴

Laws prudently established, so far from destroying our absolute rights, become their strongest support.

The absolute rights may be divided into three principal points: personal security, personal liberty, and the right to enjoy property.

202. The right of *personal security* is the principal object of the law. It consists in the legal and uninterrupted enjoyment by a man of his life, his limbs, his body, his health, and his reputation.

203. *Life* is a gift which man has received from God, and which society incessantly endeavors to secure to him, even before he is born, from the very instant he exists *in ventre sa mère*. The law does not alone punish the homicide of a man who is born, but it punishes as a misdemeanor, whoever has procured the criminal abortion of a woman quick with child, even with her consent. And though the mother appears to have some rights over the fœtus, which is yet a part of herself, she is punishable for attempting its life.

An infant *in ventre sa mère*, or in its mother's womb, is considered as having the rights of a man born, whenever it is for the interest of his life or his preservation that he should so be.⁵ It is for this reason that if a woman quick with child should be capitally convicted, her execution will be delayed until after her confinement.⁶

The law generally punishes homicide committed with premeditation, with death—and without premeditation, with a less punishment, regulated according to circumstances. It punishes even attempts upon human life, when followed by a commencement of execution.

But the law foresees still further, and places man in a state of nature by

² The Declaration of Independence lays down, as absolute rights, life, liberty, and the pursuit of happiness.

³ 1 Sharswood, Blackst. Comm. 125; Paley Mor. Phil. B. 6, c. 5; 1 Swift, Syst. 12.

⁴ 1 Sharswood, Blackst. Comm. 126.

⁵ 1 Sharswood, Blackst. Comm. 130; 1 Toullier, Dr. Civ. Fr. 210; Dig. 1, 5, 26.

⁶ Bouvier, Law Dict. *Pregnancy*.

restoring to him all his rights of self-defence, whenever it finds itself impotent and unable to protect his life, the safety of his limbs, or even his property. When he can obtain redress by applying to the law, however, he is bound to call for its aid. If in self-defence he kills the assailant, he is excused on the ground of necessity.⁷

The party attacked may undoubtedly defend himself, and the law further sanctions the reciprocal defence of such as stand in the near relation of husband and wife, parent and child, and master and servant.⁸

He who makes the attack may be resisted, and, if several join in such attack, they may all be resisted; and one may be killed, although he may not himself have given the immediate cause for such killing, if, by his presence, and his acts, he has aided the assailants.

Besides the provisions which have been made in the penal code, for the punishment of those who attempted to injure the lives of others, the law has made other provisions for the security of life, and the preservation of those unable to take care of themselves, by the establishment of hospitals, and by making a provision for the poor.

It is also with a view to maintain personal security, that a police has been established, which, even unknown to us, takes care of our persons and property.

204. The law anxiously protects not only the life, but the *limbs* of every individual. By limbs is understood those members of the body which may be useful in fight, and the loss of which amounts to mayhem by the common law. By statute law, in perhaps every state of the Union, woundings, cutting off the nose, slitting the lips, and other such grave injuries, are also punished by statute, when committed unlawfully and with premeditation; if they are committed unlawfully but without premeditation, then with penalties less severe.

The right of self-defence extends to injuries committed against the limbs and the body of a man, and the aggressor may even be killed, if the person attacked has no other means of saving himself: *si aliter periculum effugere non potest.*⁹

205. A man has the right to the protection of his *body* from all assaults and batteries, insults or menaces, and the law protects him in the enjoyment of these.

206. *Health* is of vast importance to man, for without health the blessings of life cannot be enjoyed. The law protects it whenever it is assailed. When the injury to health is so great as to affect the public, as by the erection of a nuisance, the party guilty of erecting it may be indicted; and a physician who unlawfully endangers the health of his patient, may be punished either for the misdemeanor by public indictment, or by an action by the party injured.

207. The law also guarantees to every member of society the full enjoyment of his *honor and reputation*. Confidence binds men together, and hence arises reciprocal esteem. It is to the love of esteem that the origin of honor is owing. This delicate sentiment takes its source in nature, because man naturally loves the esteem of his fellows. Honor or reputation are dearer than life, and for civilized man they are the most precious possessions. For

⁷ Hawkins, P. C. B. 2, c. 11, s. 13. To justify a killing in self-defence, the party so acting must have reasonable cause to apprehend immediate danger. *State v. O'Connor*, 31 Mo. 389; *Logue v. Commonwealth*, 38 Penn. St. 265; *Hinton v. State*, 24 Tex. 454; *Maher v. People*, 24 Ill. 241.

⁸ 2 Rolle, Abr. 546; 1 Chitty, Pract. 592.

⁹ The right of self-defence exists when a felonious assault is made on one, but cannot be exercised to protect one from a battery which will amount merely to a misdemeanor. *State v. Thompson*, 9 Iowa, 188.

this reason, reputation is so well guarded by law, which affords in general an efficacious remedy. This will be considered when we come to treat of actions.

208. *Personal liberty* is the independence in our actions of all other will than our own;¹⁰ it consists in the power of locomotion, of changing situation, of removing one's person to whatever place one's inclination may direct, without imprisonment or restraint, unless by due course of law, for some crime or wrong.¹¹ This right is protected by law, and consists in three principal points: liberty of our person and actions; liberty of thought, of speech, and printing whatever we please, subject to punishment for the abuse of this freedom; and liberty of conscience.

209. The *liberty of the person and of actions* consists in the faculty of doing whatever is not injurious to others, and what is not forbidden by the law, and without any authority in one to prevent us, to arrest or to imprison us in any case, except in cases determined by law, and according to the form it has prescribed.¹²

A necessary consequence of this liberty is the right which all citizens of the United States have of remaining in the country as long as they may desire, and where it shall please them, without being liable to be arbitrarily compelled to go out of it, or to be exiled, unless by virtue of some law, and a competent judgment.

It is of the greatest importance to the people that personal liberty should be religiously respected. If a man's property should be arbitrarily taken, the fact would alarm his fellow-citizens and they would be prepared to resist. But to arrest a man, put him in an obscure and impenetrable prison, and there leave him without any knowledge on the part of his family or friends as to his place of confinement, and perhaps forgotten by those who deprived him of his liberty, is an act which, being hidden, makes less sensation, and for that cause becomes more dangerous to public liberty. The constitution has wisely provided that no person shall be deprived of his life, liberty, or property, without due process of law.¹³

210. To protect the personal liberty of the citizen from unlawful arrests, it is the law that no person can be imprisoned for an alleged crime, unless upon the oath of some competent witness,¹⁴ and the warrant of commitment must be in writing, under the hand of a competent magistrate; it must express the cause of the commitment, and show by what authority the prisoner is committed.

No man can be committed who can give bail, except in some special cases designated by law, and no excessive bail shall be required.¹⁵

211. Still further to protect him, the law gives to the prisoner, or to any one who will sue it out on his behalf, the benefit of the writ of *habeas corpus*. This is an order in writing, signed by the judge who grants the same, and sealed with the seal of a court of which he is judge, issued in the name of the sovereignty where it is granted, by such a court or a judge thereof, having lawful authority to issue the same, directed to any one having a person in his custody or under his restraint, commanding him to produce such a person at a certain time and place, or to state the reasons why he is held in custody or under restraint. To this writ the person to whom it is addressed is required to make a return, and the judge, on that return, decrees what shall be done, whether the prisoner shall be remanded, admitted to bail, or discharged.

¹⁰ Wolffius, Inst. Nat. § 77.

¹¹ 1 Sharswood, Blackst. Comm. 134.

¹² U. S. Const. amend. 5.

¹³ U. S. Const. amend. 5.

¹⁴ Connor v. Commonwealth, 3 Binn. Penn. 38; 2 Russell, Cr. 512; U. S. Const. amend. 4, 5.

¹⁵ U. S. Const. amend. 8.

In England this writ is secured by the 31 Car. II, c. 2, and the English justly pride themselves in the existence of this remedy, which some seem to think originated with them, but of this there is just ground to doubt.¹⁶ In the United States this writ has been adopted by legislative enactments very similar to the statute of 31 Car. II, or by enforcing the provisions of that act.¹⁷

The *habeas corpus* can be suspended only by authority of the legislature. The constitution provides that "the privilege of the *habeas corpus* shall not be suspended, unless when in case of rebellion or invasion the public safety may require it."¹⁸ Whether this writ ought to be suspended depends on political considerations, of which the legislature is to decide.¹⁹ The proclamation of a military chief, declaring martial law, cannot, therefore, suspend the operation of the law.²⁰

212. Citizens of the United States may remove from the country until restrained by congress, and no citizen can be compelled to return to the country, except for the purpose of answering for some crime committed by him. He cannot, however, cast off his allegiance.²¹

213. The free communication of his thoughts and opinions is one of the most precious rights of man: every citizen may speak, write and freely print what he thinks, being responsible to the law for an abuse of this liberty. This is a natural right, which cannot be infringed by congress.²²

Members of congress and of the state legislatures, and counsel engaged in cases in court, may freely speak whatever they think proper without being responsible to any one, except, perhaps, in the case of counsel, where they maliciously utter slander without proof or instruction from their clients.²³ The right, however, does not extend beyond the mere speaking, for if a member of congress were to print his speech, containing libellous matter, he would be held responsible.²⁴

214. By *liberty of the press*, is understood the right to print and publish the truth from good motives, and for justifiable ends.²⁵

¹⁶ The words of the Digest which grant a writ similar to the *habeas corpus* are, "Ait prætor: *quem liberum dolo malo retinens, exhibeas.*" Dig. 43, 29, 1. The edict of the prætor is thus conceived: "I order you to bring before me the free person whom in bad faith you detain." This mandate, requiring the production of any person who was unlawfully held in confinement, might be sued out by any one, it being open to every person in favor of liberty. "Ait prætor, *exhibeas,*" continues the Dig. 43, 29, 8 and 9, "*exhibere est, in publicum producere, et videndi tangendique hominis facultatem præbere. Proprie autem exhibere est, extra secretam habere. Hoc interdictum omnibus competit: nemo enim prohibendus est libertati favere.*" The edict of the prætor says, that you *exhibit*. To exhibit a person is to produce him in public, and put it in the power of others to see him and to touch him. To exhibit is properly not to have in secret. This interdict is open to every one because every one is entitled to it in favor of liberty.

¹⁷ The United States courts are authorized to issue the writ of *habeas corpus*, when necessary for the exercise of their jurisdiction; when a person is confined for acts done under the authority of the United States, or when aliens are confined for acts done under authority of their government. Act of Sept. 24, 1789, 1 Stat. 81; Act of March 2, 1833, 4 Stat. 634; Act of August 29, 1842, 5 Stat. 539.

¹⁸ U. S. Const. art. 1, s. 9, n. 2.

¹⁹ *Ex parte Bollman*, 4 Cranch, 101; *Ex parte Merryman*, 24 Law Rep. 78; *Jones v. Seward*, Supr. Ct. N. Y. Oct. 1863. In 1863 the president was authorized to suspend the *habeas corpus* during the rebellion, Act of March 3, 1863, 12 Stat. 755, and he did suspend it by proclamation of Sept. 15, 1863. *Kulp v. Richards*, 20 Leg. Int. 268.

²⁰ *Johnson v. Duncan*, 3 Mart. La. 531.

²¹ See beyond 221, note.

²² U. S. Const. amend. 1.

²³ 3 Chitty, Pract. 887; *Hoar v. Wood*, 3 Metc. Mass. 193.

²⁴ Bacon, Abr. *Libel*, B.

²⁵ *People v. Crosswell*, 3 Johns. Cas. N. Y. 394.

The constitution provides, that no law shall be made abridging the freedom of speech or of the press.²⁵

The abuse of the freedom of the press is punished criminally by indictment, civilly by action; for it is evident, that if not restrained within proper bounds, or if the publisher were not responsible for libellous publications, the liberty of the press would soon become so licentious, that it would destroy itself. On the other hand, if liable to a censorship, its benefits to the public would be wholly lost.

215. Happily for our country, no sect has a preference; they are all permitted to exercise their religion according to the dictates of their consciences; and, as a guarantee for this, the constitution declares that no religious test shall ever be required as a qualification to any office or public trust under the United States,²⁷ and "congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."²⁸

To attempt to regulate the religious belief of a man, under pains and penalties, is a grievous tyranny, calculated to raise persecution and civil war. It is not more reasonable to command a man to believe what does not appear evident to him, than to order the eye to see what it cannot perceive. Man is not to be constrained in his belief; he must be enlightened, convinced, and persuaded.

216. *The right to enjoy property*, is the third absolute right of man. Considered as a natural and absolute right, it is the faculty of enjoying peaceably the property which we possess, without being constrained to part with it, without our consent.

Considered as a civil right, it is the faculty of acquiring and possessing property, and of alienating it as we please, either by our own contract, or by last will and testament, as the law prescribes.

Property, which owes its origin to natural law, has received its perfection from the civil or municipal law, by which it has become permanent. This will be the subject of our second book, when the origin and progress of property will be explained.

The right of property, includes the faculty of receiving such as is cast upon us by descent or succession, devises, legacies, and gifts; to transmit it in the same way; to acquire it by prescription, and the like.

Thus this right, absolute in its origin in society, takes a relative character. It is subject to almost an infinity of modifications, which render it so complicated, that the greatest number of disputes or contests, which arise among men, have property for their object.

217. *Relative rights* are public or private.

218. *Public relative rights*, are those which subsist between the citizens and the government, as the right of protection on the part of the people, and the duty of allegiance which is due by the people to the government. These include the political rights, such as the right of suffrage, which each citizen may exercise, and that of being eligible to all offices.

219. *Private relative rights*, are so called in contradistinction to public relative rights. These are very numerous, and to make a complete list, would not be an easy task; among them are the reciprocal rights of husband and wife, parent and child, guardian and ward, master and servant; the right of inheritance or succession, to receive a donation *inter vivos*, or by will, etc. These are considered in another place.

220. The enjoyment of civil rights is attached to the quality of citizen of

²⁵ U. S. Const. amend. 1.

²⁶ U. S. Const. amend. 1.

²⁷ U. S. Const. art. 6, s. 3.

the United States. This quality is subject to be lost by abdication or renunciation of the right of citizen, or by civil death.

221. It is the doctrine of the English common law, that a subject cannot be released from his *allegiance* to the crown, without the consent of the government; and that no man can, by his own act, throw off the duty he owes his native country by adopting another.

In the United States, this question has not yet been decided by the supreme court, but the better opinion seems to be, that a citizen cannot cast off his allegiance without the consent of the government.²⁹ Yet the naturalization laws require that on becoming a citizen of the United States, an alien shall renounce and abjure his former allegiance, without requiring any proof that his sovereign has released him from it.

If, however, congress should by law authorize expatriation, the citizen expatriated would, by that act, become an alien, and would be entitled to no other civil rights than those enjoyed by an alien.

222. *Civil death* is the state of a person who, though possessing natural life, has lost all his civil rights by a judicial condemnation, and as to them he is considered dead.³⁰

223. After having examined how civil rights are acquired and lost, it is proper now to consider how the civil state is proved.

This may be done by proof of possession, by witnesses, by private writings and by public registers. And this relates to the birth, marriage, or death of the individual.

When written evidence, made by public authority, or a register such as is recognized by law, exists as to the time and circumstances of the birth, marriage, or death of an individual, it must be produced as being the best evidence of which the case will admit, but when such written evidence does not exist, parol evidence may be given to establish those facts.

224. Proof of the *birth* of a child may be made by giving evidence of possession. When a child lives with his reputed father and mother, as such, proof of these facts will, in general, be sufficient *prima facie* to establish the fact of his legitimacy, and that he is what his condition represents him to be. His civil state may also be proved by the testimony of witnesses, as where the witness was present at the accouchement; or by private writings, such as entries in a Bible; or by the correspondence of deceased members of his family.³¹ It may also be established by public registers, authorized by law to be kept.³²

225. The civil state of *marriage* is proved either by direct evidence, establishing the fact, or by evidence of collateral facts and circumstances, from which its existence may be inferred. What is evidence for this purpose will be more fully considered when we come to examine what are the sufficient proofs of a marriage.³³

²⁹ Case of Isaac Williams, cited 2 Cranch, 82, n.; Murray v. The Charming Betsey, 2 Cranch, 64; Talbot v. Janson, 3 Dall. 133; The Santissima Trinidad, 7 Wheat. 283; Inglis v. Trustees, 3 Pet. 99; Shanks v. Dupont, 3 Pet. 242; United States v. Gillies, 1 Pet. C. C. 159. These decisions of the courts have thrown doubt on the question whether a citizen of the United States could renounce his allegiance; but it is clear that we cannot claim of other governments more than we allow ourselves. The Act of July 27, 1868, 15 Stat. 223, declares that "the right of expatriation is a natural and inherent right of all people," and enacts "that any declaration, instruction, opinion, order or decision of any officers of this government which denies, restricts, impairs, or questions the right of expatriation, is hereby declared inconsistent with the fundamental principles of this government."

³⁰ Platner v. Sherwood, 6 Johns. Ch. N. Y. 118; Troup v. Wood, 4 Johns. Ch. N. Y. 228, 260; Coke, Litt. 130 a; 1 Sharswood, Blackst. Comm. 132, 133.

³¹ 1 Greenleaf, Ev. § 104; Phillips & A. Ev. 229; 1 Phillipps, Ev. 216; Doe v. Griffin, 15 East, 203.

³² Beyond, 311.

³³ Beyond, 262

226. It is in the place of his domicile, that a man exercises his civil and political rights. After having shown how he acquires the enjoyment of the rights which constitute the civil state, and how those rights are proved, it is now proper to point out the rules which fix his domicile.

227. *Domicil* is the place where a person has established his ordinary dwelling, without a present intention of removal.³⁴

A man cannot be without a domicile; at his birth he acquires that of his parents, and this he retains until he gains another by his choice,³⁵ or by operation of law.

By fixing his residence at two different places at the same time, a man may have, for some purposes, two domicils at one and the same time; as, for example, if a foreigner, coming to this country, should establish two houses, one in New York and the other in New Orleans, and pass one half of the year in each, he would for most purposes have two domicils.³⁶ If a man has two places of residence he may elect which shall be his domicile.³⁷

But it is to be observed that circumstances which might be held sufficient to establish a commercial domicile in time of war, and a matrimonial, or forensic, or political domicile in time of peace, might not be such as would establish a principal or testamentary domicile, for there is a wide difference in applying the law of domicile to contracts and to wills.³⁸

There are three kinds of domicils, namely: the domicile of origin, *domicilium originis vel naturalis*; the domicile by operation of law, or necessary domicile; the domicile of choice. These will be severally considered.

228. By *domicil of origin*, is understood the home of a man's parents at the time of his birth, not the place where, the parents being on a visit or journey, a child happens to be born. The domicile of origin is to be distinguished from the accidental place of birth.³⁹

229. There are two classes of persons who acquire or retain a domicile *by operation of law*. Those who, being under the control of another, the law gives them the domicile of that other; those on whom the state affixes a domicile.

230. Among those who, being under the control of another, acquire such person's domicile, are—

The *wife*. She takes the domicile of her husband.⁴⁰ On becoming a widow, she retains it until she changes it, which may be done in two ways; first, by removing to another place, with an intention of fixing her domicile there; secondly, by marrying again, in which case she immediately takes the domicile of her new husband.⁴¹

A *minor*. His domicile is that of his father, or in case of his death, that of his mother.⁴² When his father and mother are both dead, the minor's

³⁴ The *Venus*, 8 Cranch, 278; *Thorndyke v. City of Boston*, 1 Metc. Mass. 242; 1 Binn. Penn. 349, n.; *Foster v. Hall*, 4 Humphr. Tenn. 346.

³⁵ 1 Binn. Penn. 349, n.; *Somerville v. Somerville*, 5 Ves. Ch. 787; 3 C. Rob. Adm. 191; *Jennison v. Hapgood*, 10 Pick. Mass. 77; *Abington v. North Bridgewater*, 23 Pick. Mass. 170.

³⁶ *Greene v. Greene*, 11 Pick. Mass. 440. See *Somerville v. Somerville*, 5 Ves. Ch. 750.

³⁷ *Burnham v. Rangeley*, 1 Woodb. & M. C. C. 7.

³⁸ *Phillimore*, Dom. xx; *Greene v. Greene*, 11 Pick. Mass. 410; *Putnam v. Johnson*, 10 Mass. 488; 4 Wash. C. C. 514.

³⁹ *Guier v. O'Daniel*, 1 Binn. Penn. 349, n.; 2 Bos. & P. 231, n.

⁴⁰ *Greene v. Greene*, 11 Pick. Mass. 410; *Hackettstown Bank v. Mitchell*, 4 Dutch. N. J. 516; *Hanberry v. Hanberry*, 29 Ala. N. S. 719.

⁴¹ Add. Eccl. 519.

⁴² *Somerville v. Somerville*, 5 Ves. Ch. 787; *School Directors v. James*, 2 Watts & S. Penn. 568; *Parsonfield v. Kennebunkport*, 4 Me. 47; *Wheeler v. Burrow*, 18 Ind. 14; *Lacy v. Williams*, 27 Mo. 280. But where a widowed mother remarries, the children by the first marriage do not acquire her new domicile. *Johnson v. Copeland*, 35 Ala. N. S. 531; *Brown v. Lynch*, 2 Bradf. Surr. N. Y. 214.

domicil is in general that of his guardian, but to this there are some exceptions.⁴³

A lunatic. In general the domicil of the lunatic is that of his guardian, curator, committee or other person who is lawfully appointed to take care of him. In this respect he resembles a minor. But the domicil of such a person may be changed by direction or with the assent of his guardian, either express or implied.⁴⁴

231. It is but reasonable that a man who serves the public, and is compelled for this purpose to change his place of residence, should not on this account lose his domicil; for this there is a double reason, first that the public should be better served, and secondly, because the officer did not intend to abandon his old domicil, but left it *animo revertendi*.

232. Persons who thus retain their domicil may be classed as follows:

Public officers whose temporary duties require them to reside at the capitol, as the President of the United States, the several secretaries, etc.

American ambassadors and consuls who are compelled to go abroad in order to fulfil the duties of their appointments. And this privilege extends to their family or suite.

Officers, soldiers and sailors of the United States do not lose their domicil, while thus employed.

A *prisoner* does not acquire a domicil where the prison is located, nor lose his old, because there is no intention on his part to do so.⁴⁵

233. The domicil of origin is retained until another is acquired by the act of the party, or by operation of law. In order to acquire a *domicil of choice*, there must be an actual removal with an intention of residing in the place to which the party has removed.⁴⁶ As soon as the removal is completed, with such intention, the new domicil is acquired, and the old one is lost.⁴⁷

A mere *intention to remove*, unless such intention be carried into effect, is not sufficient to operate the change.⁴⁸ And the mere intention of sometime returning,⁴⁹ or a declared intention, inconsistent with facts of residence elsewhere,⁵⁰ will not prevent acquisition of a new domicil.

When a man changes his domicil and gains another, and afterwards returns to his original domicil with an intention to reside there, his original domicil is at once restored.⁵¹

These principles of law fixing domicil of choice are, as has been seen, few and simple. The difficulties in determining questions of domicil are mainly those of fact and herein principally of ascertaining the intention of the party. Some of the circumstances which are of importance are, the removal of a family,⁵² the claim and exercise of the right to vote,⁵³ designation as of a place,⁵⁴ and others best examined in the reported cases.⁵⁵

⁴³ *School Directors v. James*, 2 Watts & S. Penn. 568; *Trammell v. Trammell*, 20 Tex. 406.

⁴⁴ *Holyoke v. Hoskins*, 5 Pick. Mass. 20.

⁴⁵ *McPherson v. Housel*, 2 Beasl. N. J. 35.

⁴⁶ *Jennison v. Hapgood*, 10 Pick. Mass. 77; *Cooper v. Galbraith*, 3 Wash. C. C. 546; *McKowen v. McGuire*, 15 La. Ann. 637.

⁴⁷ *Wilton v. Falmouth*, 22 Me. 479; *Graham v. Public Administrator*, 4 Bradf. Surr. N. Y. 127; *Layne v. Pardee*, 2 Swan, Tenn. 232.

⁴⁸ *Hallowell v. Saco*, 5 Me. 143; *State v. Hallet*, 8 Ala. 159; *Bangor v. Brewer*, 47 Me. 97.

⁴⁹ *Barton v. Irasburgh*, 33 Vt. 59.

⁵⁰ *In re Steer*, 3 Hurlst. & N. Exch. 594; *Holmes v. Greene*, 7 Gray, Mass. 299.

⁵¹ *Miller's estate*, 3 Rawle, Penn. 312. *The Ann Green*, 1 Gall. C. C. 274, 284; *La Virginie*, 5 C. Rob. Adm. 99.

⁵² *State v. Groome*, 10 Iowa, 308; *Chaine v. Wilson*, 1 Bosw. N. Y. 673; *Smith v. Croom*, 7 Fla. 81; *Pearce v. State*, 1 Sneed, Tenn. 63.

⁵³ *Kellogg v. Oshkosh*, 14 Wisc. 623; *Mandeville v. Huston*, 15 La. Ann. 281.

⁵⁴ *Attorney General v. Pottinger* 6 Hurlst. & N. Exch. 733.

⁵⁵ *Fisk v. Chester*, 8 Gray, Mass. 506; *Hegeman v. Fox*, 31 Barb. N. Y. 475.

234. Having treated of the domicile, it is proper to consider an absence from it, and its effects.

The law watches with care the rights of a man during the whole of his life, and even before his birth, while *in ventre sa mère*. It is to be regretted that in general it is so loose on this important subject, and that the questions which arise are to be decided frequently by the opinion of the judges, unaided by any statutory provision.

By *absence*, is sometimes meant that a person is not at the place of his domicile, yet his place of residence being known, or news or information having been received from him, his existence is not uncertain. But in a more confined and more technical sense, absence signifies that the residence of the person, who is not at the place of his domicile, is unknown, and that, for this reason, his existence is doubtful. It is in this last sense that it is here considered.

When a person has been absent for a long time, unheard from, the law will presume him to be dead: it has been adjudged, that after twenty-five years;⁵⁴ twenty years; in another case, sixteen years;⁵⁷ fourteen years;⁵⁸ twelve years;⁵⁹ and seven years;⁶⁰ the presumption of death arises. It seems to be agreed, that after an absence of seven years, without being heard from, the presumption of death is sufficient to treat the absentee's property as if he were dead; though, like every other presumption, this may be rebutted by showing that the absentee is alive.⁶¹

In consequence of this absence and presumed death, administration will be granted on his estate, and guardians may be appointed to his children; his property will vest in his heirs, subject to be divested by proof that the absentee is alive; and his wife may marry without being guilty of the crime of bigamy⁶² or adultery;⁶³ but if the first husband is in fact living, such a second marriage is utterly void.⁶⁴

⁵⁴ *Dixon v. Dixon*, 3 Brown, Ch. 510.

⁵⁷ *Mainwaring v. Baxter*, 5 Ves. Ch. 458.

⁵⁸ *Miller v. Beates*, 3 Serg. & R. Penn. 490.

⁵⁹ *King v. Paddock*, 18 Johns. N. Y. 141.

⁶⁰ *Loring v. Steinman*, 1 Metc. Mass. 204; *Burr v. Sim*, 4 Whart. Penn. 150; *Bradley v. Bradley*, 4 Whart. Penn. 173.

⁶¹ *Phillipps*, Ev. 159. *Smith v. Knowlton*, 11 N. H. 191.

⁶² *Fenton v. Reed*, 4 Johns. N. Y. 52.

⁶³ *Commonwealth v. Thompson*, 6 All. Mass. 591.

⁶⁴ *Kenley v. Kenley*, 2 Yeates, Penn. 207.

CHAPTER IV.
MARRIAGE AND DIVORCE.

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235. Marriage owes its institution to the law of nature, and its perfection to the municipal or civil law. It is considered in this country as a civil contract simply, and not, as in some countries, a sacrament.

As an institution established by nature, it consists in the free and voluntary consent of both parties, in the reciprocal faith which they pledge to each other. As a civil contract, it not only requires the free consent of the parties, but, also, that that consent shall be lawful, that is, conformable to the laws of the state where the contract takes place.

236. Viewed in this light, *marriage* is a contract, made in due form of law, by which a free man and a free woman reciprocally engage to live with each other during their joint lives, unless it shall be lawfully dissolved within that time, in the union which ought to exist between husband and wife, for the purpose of perpetuating their species, to assist each other, and to share a common destiny as to the good or evil which shall happen to them. By the terms free man and free woman, here used are meant, not only that they are free, and not slaves, but also, that they are clear of all bars to a lawful marriage.¹

This subject will be examined by taking a rapid view of the qualities required to contract marriage; of the form of marriage; of the place where it is made; of the proof of marriage; of void and voidable marriages; of the effects of a lawful marriage; of the dissolution of marriage.

237. Every person may contract marriage, unless prevented by some legal bar, or some cause which forbids such marriage. These bars to marriage may be arranged into the following classes:

Want of competent age.

Want of consent.

A former marriage subsisting.

Consanguinity or affinity.

Want of consent of parents.

Civil death.

Crime of adultery.

238. The end of marriage is the procreation of children and the propagation of the species. Before arriving at *puberty*, persons are by nature incapable of contracting a lawful marriage; because they do not possess these qualities. But the age of puberty varies according to climate and circumstances, and a general rule must exist to establish this period. The Roman and canon law fix it, in males, at fourteen; and, in females, at twelve years of age. This rule has been adopted by the common law.

If, therefore, a boy under fourteen, and a girl under twelve years, marry, this marriage is inchoate and imperfect, and may be avoided by them on attaining their respective ages.²

A continued cohabitation after both parties have arrived at the age of consent is a confirmation of the marriage.³

239. The *consent* of the contracting parties, and not cohabitation, form the essence of marriage: *Nuptias consensus, non concubitus facit*.⁴ If there is no consent, when there is only an appearance of it, the contract is null, and may be so declared by a competent tribunal. When, for example, there is a want of reason; constraint or duress; mistake or fraud; or fraud on account of impotency.

240. The *want of reason* renders the party absolutely incapable of giving his consent to a marriage, and makes the contract invalid.⁵ But, a man becoming insane afterward, does not destroy the marriage, which was legal when made.⁶

¹ Shelford, Marr. & D. c. 1, s. 1; Dig. 23. 2. 1; Ayliffe, Parer. 359; Stair, Inst. tit. 4, s. 1.

² 1 Sharswood, Blackst. Comm. 436; Parton v. Hervey, 1 Gray, Mass. 119. The age of consent has been changed by statute in some of the states; in Iowa it is sixteen and fourteen, Iowa Rev. L. 1860, s. 2515; in Illinois seventeen and fourteen, Ill. St. 1858, vol. 1, p. 579; in Michigan, Ohio, and Indiana, eighteen and fourteen; Act Mich. 1832; Ohio, St. 1831; Ind. Rev. St. 1838; in Minnesota, eighteen and fifteen, Minn. St. 1858, ch. 52.

³ Koonce v. Wallace, 7 Jones, No. C. 194.

⁴ Dig. 50, 17, 30; 35, 1, 15; Coke, Litt. 33.

⁵ 1 Rolle, Abr. 357; Middleborough v. Rochester, 12 Mass. 363; Clement v. Matison, 3 Rich. So. C. 93.

⁶ Dig. 23, 1. 8; 2. 16; 1 Sharswood, Blackst. Comm. 438, 439.

If the party is insane from delirium tremens, or is intoxicated at the time, the marriage is void.⁷ The same degree of reason is required to contract a valid marriage as is required in other contracts as deeds or wills.⁸

241. When there has been actual or physical constraint, as where a woman is taken and carried away against her will, and violence has been used and continues at the time of the ceremony, it is evident there was no consent, and therefore, the marriage may be annulled by her.

But the constraint may simply be moral and concealed: the body may be free, but the mind constrained. This constraint may arise from bad treatment or anterior threats, and the fear which is the consequence may determine a woman against her will to declare that she consents. This is a consent only in appearance. If the violence amounts to duress, the marriage will be void; but if the threats are not of this nature, although perhaps the marriage cannot be declared null on that ground, yet evidence of such acts, it is presumed, would be evidence of fraud, and, on this ground, the marriage might be declared void.⁹

Reverential fear, such as that of displeasing a passionate father, is not sufficient to cause the marriage to be annulled. There must be an actual and present fear: *Metum presentem esse oportet, non suspicionem inferendi ejus.*¹⁰

The constraint, too, must have had the marriage for its object. For example, a powerful and violent neighbor threatens you with death; to appease him, you offer him your daughter in marriage, and she consents to marry him to save your life; the marriage would not be null for want of consent, because the threats had nothing to do with the proposed marriage.¹¹

242. When any contract is made, and the subject matter of such contract is mistaken by one of the parties in consequence of the fraud of the other; as if a man professing to sell me paint, shows me an article which has all that appearance, and in consequence of his fraud in concealing its true character, I am deceived, and instead of paint he sells me an article which is not paint, I may avoid the sale.¹²

So there is no valid consent if, intending to marry Mary, I marry Sarah, through the concealment or the fraud of the latter. It is almost impossible to give an example of a marriage where, in modern times, there has been a physical mistake as to the person, yet a case has been recorded where it occurred.¹³

243. An error of this kind can scarcely fall on any thing except the moral or social condition of the person. It may be observed generally, that when the error falls only on some advantages of fortune, or some moral qualities of the party, it is no cause for annulling the marriage; as, if believing Mary to be rich and virtuous I married her, and afterward ascertained she was poor and vicious, the marriage would still be good.¹⁴

244. A grave question might be raised in a case where a woman, by fraud, had induced a man to marry her in a free state, by making him believe she was free, when in fact she was, at the time of the marriage, a slave in another state. The marriage would probably be attacked on the ground that the slave could not make such a contract, yet, being in a free state, she could not be con-

⁷ True v. Ranney, 1 N. H. 52; Burrett v. Buxton, 2 Aik. Vt. 167.

⁸ Atkinson v. Medford, 46 Me. 510.

⁹ 2 Greenleaf, Ev. § 464.

¹⁰ Dig. 4, 2, 9.

¹¹ Boehmer, Jus Eccl. tit. de Spons. § 139.

¹² Borrekens v. Bevan, 3 Rawle, Penn. 26; Jennings v. Gratz, 3 Rawle, Penn. 168.

¹³ Gen. xxix. 23.

¹⁴ See 2 Hagg. Cons. 248; Benton v. Benton, 1 Day, Conn. 111. But if a man marries a woman believing her to be chaste, when in fact she is with child by another, the marriage will be declared void. Reynolds v. Reynolds, 3 All. Mass. 605.

sidered there as a slave,¹⁵ and if the contract is valid where made, it is in general good everywhere.¹⁶

245. By *impotence* is meant the incapacity for copulation or propagating the species. It has been used synonymously with sterility.

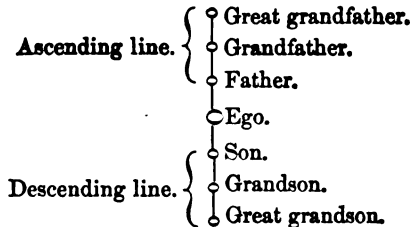
Impotence is curable or incurable; when it is curable it is no cause either for declaring the marriage null or for a divorce; when it is incurable it may be good cause for a divorce, but the marriage is not for that cause void *ab initio*.¹⁷

246. A *subsisting marriage* is a complete bar to a new one.¹⁸ The person who would marry a second time pending the first marriage would be guilty of bigamy, and punishable criminally as such, unless he or she proved that the second marriage was contracted in good faith. This takes place when the husband or wife has been absent for seven years without being heard from, as has already been observed.¹⁹ But as the marriage cannot be dissolved by mere absence, the second marriage will be declared null and void, *ab initio*,²⁰ the absence merely purges the felony. The code of Louisiana distinguishes between acknowledged natural children and adulterine children,—the latter not being allowed to take as legatees. Where a second bigamous marriage is made in ignorance of the bigamy and in good faith, the issue of such marriage may take as legitimate.²¹

247. *Consanguinity* or *kindred* is the relation subsisting among all the different persons descending from the same stock or common ancestor.²²

The series of persons who have descended from a common ancestor, placed one under the other in the order of their birth, is called a *line*. The line connects successively all the relations by blood to each other.

248. There are two lines, the direct and the collateral. The following paradigm will explain the direct line.



The direct line is divided into two parts; the ascending line, which, commencing at *ego* the *propositus*, takes in the father, grandfather, and great grandfather; and the descending line is that, which, counting from the same person, descends to his son, grandson, and great grandson.

249. The collateral line is a series of persons who descend from a common ancestor. It is called collateral, *quasi à latere*, because it is composed of two direct lines which descend along side of each other, in setting out from the

¹⁵ *Prigg v. Pennsylvania*, 16 Pet. 539.

¹⁶ Story, Conf. of Laws, § 121.

¹⁷ See Bacon, Abr. *Marriage*, E. 3; 1 Sharswood, Blackst. Comm. 440; Comyn, Dig. *Baron and Feme*, (C 3;) Beck, Med. Jur. 67; Code, 5, 17, 10.

¹⁸ *Sellers v. Davis*, 4 Yerg. Tenn. 503; *Jones v. The State*, 5 Blackf. Ind. 141; *Summerlin v. Livingston*, 15 La. Ann. 342.

¹⁹ Before, 234.

²⁰ *Kenley v. Kenley*, 2 Yeates, Penn. 207; *Fenton v. Fenton*, 4 Johns. N. Y. 52.

²¹ *Gaines v. Hennen*, 24 How. 553. So also in Texas under the Spanish Law. *Lee v. Smith*, 18 Tex. 141.

²² 2 Sharswood, Blackst. Comm. 202.

Those where there is a near affinity between the parties. In some states the marriage of a man to his sister-in-law has been dissolved for that cause,²⁵ while in others such marriage would be valid.²⁶

253. In general the consent of parents is not required in order to give validity to a marriage.²⁷ In some states there are provisions giving a right to the father to sue for a penalty the clergyman or magistrate who shall marry his minor child.²⁸

It is to be regretted that paternal authority is not more respected, for whenever that is disregarded other duties are neglected.

254. A person who is civilly dead, having no capacity to make a contract, of course cannot marry.

255. By the Roman law, which has been adopted in some of the United States, a person who had committed adultery, and for this cause was divorced, at the suit of the innocent party, could not afterward marry the partner of his or her guilt.²⁹ But if, to evade the law, he is married in a state where such marriage is valid, and he returns to his own state, the marriage cannot be impeached on that ground.³⁰

256. Various forms have been adopted in the several states, and they have, each, received the sanction of the courts. And though in perhaps all the states of the Union, there are statutes regulating the celebration of the marriage rites, and inflicting penalties on all who disobey their injunctions, yet, in general, it may be stated, that in the absence of a positive statute, declaring that a marriage not celebrated in the manner they prescribe, shall be absolutely void, or that none but certain designated persons shall solemnize a marriage, any marriage regularly made according to the common law would be valid, although the regulations of the statute may not have been observed.³¹ These will be briefly considered by taking a view of the persons before whom the marriage is to take place; the form or ceremony to be used.

257. Marriage being but a civil contract, it may be entered into, by the common law, before a magistrate, a clergyman, or simply before witnesses. It is not indispensable that a clergyman should be present. Among some of the religious sects, the quakers for example, the only persons present are the witnesses, who are generally the guests at the wedding. In most of the states, certain persons have been designated who are authorized to marry.

258. No particular form is requisite, but the parties must take each other for

²⁵ *Commonwealth v. Perryman*, 2 Leigh, Va. 717.

²⁶ *Story*, *Conf. of Laws*, § 115.

²⁷ In some of the states the consent of parents is required where the parties are under twenty-one and eighteen years of age respectively: *Mass. Gen. St. ch. 106, § 13*; *Ind. Rev. St. p. 412*; or where either party is a minor: *Vt. Rev. St. 1839, p. 219*; *Conn. St. 1838, p. 412*. But the non-consent of the parents merely renders the person solemnizing the marriage liable to a penalty, and does not invalidate the marriage. *Milford v. Worcester*, 7 *Mass. 48*; *Ellis v. Hull*, 2 *Aik. Vt. 41*; *Hiram v. Pierce*, 45 *Me. 367*.

²⁸ 2 *Kent, Comm. 86*.

²⁹ 1 *Toullier, Dr. Civ. Fr. n. 555*; *Penn. Act of March 13, 1813*.

³⁰ *Putnam v. Putnam*, 8 *Pick. Mass. 433*. See *Phillips v. Gregg*, 10 *Watts, Penn. 168*.

³¹ 2 *Kent, Comm. 91, 92*; *Hantz v. Sealey*, 6 *Binn. Penn. 405*; *Milford v. Worcester*, 7 *Mass. 48, 55*; *Londonderry v. Chester*, 2 *N. H. 268*; *Reeves, Dom. Rel. 196, 200, 290*; *State v. Murphy*, 6 *Ala. 765*. The language of the courts has in some cases tended to show that marriages not contracted according to the statute requirements would be void; but no decision has gone so far as to bastardize the issue. *Milford v. Worcester*, 7 *Mass. 48*; *Ligonia v. Baxton*, 2 *Me. 102*; *Wyckoff v. Boggs*, 2 *Halst. N. J. 138*; *Newbury v. Brunswick*, 2 *Vt. 151*; *Londonderry v. Chester*, 2 *N. H. 268*. Where the validity of the marriage comes in question collaterally, in civil cases, it is sufficient to show long-continued cohabitation as husband and wife: *Kenyon v. Ashbridge*, 35 *Penn. St. 157*; *Harman v. Harman*, 16 *Ill. 85*; *Henderson v. Cargill*, 81 *Mo. 367*; *Dumbarton v. Franklin*, 19 *N. H. 257*; *Cunningham v. Burdell*, 4 *Bradf. Surr. N. Y. 843*.

husband and wife, in the present tense. The consent of the parties is all that is requisite, and as marriage is a contract *jure gentium*, that consent is all that is needful by natural or public law. If the contract be made *per verba de presenti*, though not consummated by cohabitation, or if made *per verba de futuro*, and followed by consummation, it will be a good marriage, unless prohibited by positive regulations to the contrary.³²

259. A promise to marry at a future time cannot be construed into a marriage, though it may afford an action for its breach.

On the same principle, a declaration of marriage, however distinctly applicable to the present time, if it incorporate words which make it conditional, would probably be considered as insufficient; as where the man wrote to the woman thus: "You and I having lived together as man and wife for some time, I hereby declare you to be my lawful wife, in the event of a child being born in consequence of the present connection between us." This was held to be no marriage by the laws of Scotland, on the ground that there was no present engagement.³³

And a contract to marry *per verba de futuro*, followed by cohabitation, when the parties do not cohabit as husband and wife, or hold themselves out as such, does not amount to a marriage.³⁴

260. As a general rule, a marriage which is valid by the law of the place where it is celebrated, is good everywhere; if invalid there, it is invalid everywhere.³⁵

261. But to this rule there are several exceptions:—

Incestuous marriages would not be holden good in any of the United States. But the incest must be such as is generally understood to be so, at least by Christian states. And a person who married two wives, where polygamy is allowed, would not be considered as having contracted a legal marriage with the second.³⁶

When the positive law of the country *prohibits* such marriage. But it was holden in a case in Massachusetts,³⁷ that when the parties left the state for the purpose of evading the statute law, and of marrying in opposition to it, and, being married, returned to it, the marriage was valid, if valid according to the laws of the place where it was made.

Where, in *cases of necessity*, a marriage is celebrated, not according to the laws of the country where it takes place, but according to the laws of the country of the parties; as, for example, where persons reside in factories, in conquered places, or in desert or barbarous countries, or in countries of an opposite religion. In these cases such contract is held valid on the ground of necessity.³⁸

³² Fenton v. Reed, 4 Johns. N. Y. 52; Jackson v. Winne, 7 Wend. N. Y. 47; 2 Kent, Comm. 87; 2 Greenleaf, Ev. § 460; Cram v. Burnham, 5 Me. 213; Bacon, Abr. *Marriage*, A; Hants v. Sealey, 6 Binn. Penn. 405; Mount Holly v. Andover, 11 Vt. 226. A promise to marry followed by cohabitation is not a marriage in Ohio. Duncan v. Duncan, 10 Ohio St. 181.

³³ Burton, Man. Priv. Rights, c. 1, § 1.

³⁴ Cheney v. Arnold, 15 N. Y. 345.

³⁵ Story, Conf. of Laws, § 113; 2 Kent, Comm. 92; Morgan v. McGhea, 5 Humph. Tenn. 13; Phillips v. Gregg, 10 Watts, Penn. 158; Roche v. Washington, 19 Ind. 53.

³⁶ Story, Conf. Laws, § 114. A marriage between a man and his mother's sister is not incestuous by the laws of nature; and such a marriage in England, where it is voidable merely, will be held good in this country. Sutton v. Warren, 10 Metc. Mass. 451. The court says in this case that marriages between relatives in the direct line and between brothers and sisters are alone incestuous by the laws of nature.

³⁷ Medway v. Needham, 16 Mass. 157; Putnam v. Putnam, 8 Pick. Mass. 433. But see Williams v. Oates, 5 Ired. No. C. 535, *contra*.

³⁸ Story, Conf. Laws, § 118. See Ruding v. Smith, 2 Hagg. Cons. 871, 884; Latour v. Teesdale, 8 Taunt. 830; Loring v. Thorndike, 5 All. Mass. 257.

262. It is usual for a magistrate or clergyman, who officiates at the making of the marriage, to make a record of it, and also to give a certificate of it signed by himself, to the parties. In those religious societies, also, where marriages take place without the agency or presence of a magistrate or clergyman, a record of them is kept, and a certificate, signed by the parties and the witnesses, is delivered to the former.

To secure proof of marriage the statutes generally provide that the parties shall make a declaration of their intention before some designated public officer, who thereupon issues a license. The person solemnizing the marriage makes a record, and returns the license with his certificate of marriage to the town clerk or other officer designated to keep such records. A certified copy by the clerk of the record is usually made good evidence of the marriage, and together with proof of the statutes will be sufficient evidence in another state.³⁹

263. Marriage may be proved, either by direct testimony or by the evidence of facts, from which it may be inferred.⁴⁰ Evidence of this kind is indispensable upon the trial for bigamy or for adultery, and in actions for criminal conversation. In such cases, the marriage must be proved to have been valid in all respects, for, without this proof, there is no evidence of guilt.⁴¹

In these cases the fact of cohabitation as man and wife is not sufficient to prove the marriage.⁴² But a marriage by a pretended clergyman by collusion with the husband is sufficient to support the charge.⁴³

264. The affirmative sentence or judgment of a court having jurisdiction of the question of marriage or no marriage, is conclusive evidence of the marriage, as *res judicata*.⁴⁴

The validity or invalidity of a marriage cannot be determined where it is collateral to the question at issue.⁴⁵

265. Proof by witnesses present at the celebration,⁴⁶ or by an examined or certified copy of the register of the marriage, when such register is required by law, with proof of the identity of the parties, is sufficient.

266. In civil causes, other than actions for seduction, marriage may also be proved by reputation, the declarations and conduct of the parties, and other circumstances usually attending that relation.⁴⁷

Cohabitation is in general *prima facie* evidence of marriage, but not so when it would render one party liable to the charge of bigamy.⁴⁸

267. General reputation is admissible to prove the fact of marriage of the parties spoken of.⁴⁹

268. Declarations by the parties made *ante litem motam*, may be given in evidence to prove a marriage.⁵⁰

On a trial for bigamy the admissions of the defendant are good evidence to

³⁹ Succession of Taylor, 15 La. Ann. 313. See Viall v. Smith, 6 R. I. 417.

⁴⁰ Jewell's Lessee v. Jewell, 1 How. 219; 17 Pet. 213; Weaver v. Cryer, 1 Dev. No. C. 337; Taylor v. Shemwell, 4 B. Monr. Ky. 575.

⁴¹ State v. Hodgskins, 19 Me. 155.

⁴² Case v. Case, 17 Cal. 598. This rule is altered by statute in some states. Commonwealth v. Hurley, 14 Gray, Mass. 411.

⁴³ Hayes v. People, 25 N. Y. 390.

⁴⁴ 1 Greenleaf, Ev. § 484, 493, 544, 545.

⁴⁵ Barnett v. Kimmell, 35 Penn. St. 13.

⁴⁶ Commonwealth v. Norcross, 9 Mass. 492; Commonwealth v. Littlejohn, 15 Mass. 163.

⁴⁷ Senser v. Bower, 1 Penn. 452; Northfield v. Vershire, 33 Vt. 110; Commonwealth v. Hurley, 14 Gray, Mass. 411; Kenyon v. Ashbridge, 35 Penn. St. 157; Archer v. Haitchcock, 6 Jones, No. C. 421; Chiles v. Drake, 2 Metc. Ky. 146.

⁴⁸ Case v. Case, 17 Cal. 598.

⁴⁹ Evans v. Morgan, 2 Crompt. & J. Exch. 455; Weaver v. Cryer, 1 Dev. No. C. 337; Taylor v. Shemwell, 4 B. Monr. Ky. 575; Selser v. Bower, 1 Penn. 450.

⁵⁰ Jackson v. Clan, 18 Johns. N. Y. 346; Forney v. Hallacher, 8 Serg. & R. Penn. 159.

prove his marriage.⁵¹ And *per contra* it is held that the declarations of the parents are admissible to prove they were not married at the time of the birth of a child.⁵²

269. The conduct of the parties may also be given in evidence to prove a marriage. It is competent for the party on whom the affirmative of the issue lies, to show the conduct of the parties, their conversations and letters, addressing each other as man and wife;⁵³ their appearing in respectable society, and there being received and considered as husband and wife; the assumption by the woman of the name of the man;⁵⁴ and any other such conduct. Their cohabitation as husband and wife is presumed to be lawful until the contrary appears.⁵⁵

270. When a contract in writing is essential to the marriage, either in consequence of some public law or of some rule of the religious community to which the parties belong, and when in fact the contract has been reduced to writing, though it was not required, such writings are admissible to prove the marriage. And a certificate of marriage, though ordinarily not in itself evidence of the fact it recites, yet if properly kept, and produced from the proper custody, may be read as collateral proof.⁵⁶

271. After the death of the parties, or of either of them, the marriage cannot be avoided,⁵⁷ and after a lapse of thirty years and the death of all the parties, legitimacy will be presumed on slight proof.⁵⁸

272. Marriage produces different effects towards the spouses and their issue, when it is void, from those which are produced when it is merely voidable. A *void marriage* is one which is as if it had not been made, the spouses receive no benefit whatever and acquire no right from it, and their issue is illegitimate. A *voidable marriage* is one which, for some defect, may become void; but till it is attacked on that ground, it is good.

273. *Marriages* are *void* on account of some radical vice, which cannot be cured. These defects may be classed as follows:—

When they *violate a law of nature*, as marriages between lineal ascendants and descendants, as between father and daughter.

When the spouses are related to each other within any other degree of consanguinity *forbidden by law*.⁵⁹

When an act of assembly or other legislative act *declares them void*.⁶⁰

When both or either of the parties are wholly *incapable of consenting*; as in the case of a lunatic.⁶¹

When either of the parties is *married* at the time of such marriage.⁶²

When the marriage is tainted with *fraud*.⁶³

274. A *voidable marriage* is one which has some force and effect, but which, on account of some inherent quality, may be annulled and avoided; as, where a minor under fourteen years of age marries, he may avoid the marriage on

⁵¹ *State v. Seals*, 16 Ind. 352.

⁵² *Crawford v. Blackburn*, 17 Md. 49; *Haddock v. Boston R. R.* 3 All. Mass. 298.

⁵³ *Alfray v. Alfray*, 2 Phill. Eccl. 547.

⁵⁴ *Hubback, Ev. of Succ.* 247.

⁵⁵ *Telts v. Foster*, 1 Tayl. No. C. 121; *Allen v. Hall*, 2 Nev. & M. 114.

⁵⁶ *Hubback, Ev. of Succ.* 258; 2 Greenleaf, Ev. § 463.

⁵⁷ *Coke, Litt.* 33 a; 1 Sharswood, Blackst. Comm. 434; *Bonham v. Badgley*, 7 Ill. 622.

⁵⁸ *Johnson v. Johnson*, 1 Des. Eq. So. C. 595; *Johnson v. Johnson*, 30 Mo. 72; *Canjolle v. Ferrie*, 23 N. Y. 90.

⁵⁹ *Moore v. Whitaker*, 2 Harr. Del. 50.

⁶⁰ *The State v. Hooper*, 5 Ired. No. C. 201.

⁶¹ *Wrightman v. Wrightman*, 4 Johns. N. Y. 343.

⁶² *Sellers v. Davis*, 4 Yerg. Tenn. 503; *Jones v. The State*, 5 Blackf. Ind. 141.

⁶³ *Scott v. Shufeldt*, 5 Paige, Ch. N. Y. 43.

coming of age; but if he sanctions it, after that period, it will be valid, and cannot afterward be impeached on that ground.

A voidable marriage is valid for all civil purposes as long as it continues; it may be avoided at the discretion of the parties while they live, but not after the death of either of them.

275. In treating of the rights and liabilities arising from marriage we shall consider first the rights and duties of the husband; second, the rights and duties of the wife; third, their obligations toward their children, and their rights as to them.

276. Persons who marry, contract by the marriage, reciprocally toward each other, the obligation to live together during the existence of the marriage; and they may be considered, in some sense, as one individual: *Erunt duo in carne una.*⁶⁴ For this reason the very being of the wife is, for most purposes, merged in that of her husband, and it is under his protection and cover that she performs every thing; hence she is called a *feme-covert*, and her state during the marriage is denominated *coverture*.⁶⁵

277. The husband is bound to receive his wife at his home and treat her there as a husband should do, that is, furnish her with all the necessities and conveniences which his fortune enables him to do, and which her situation requires; but this does not include such luxuries as, according to her fancy, she deems necessities.⁶⁶

By the term *necessaries* is meant all such things as are proper and requisite for the sustenance of man. Whenever the husband by his misconduct has obliged his wife to take up necessary things on credit, he must pay for them, though he may have previously warned the tradesman not to trust her; but if her own misbehavior has reduced her to want, he cannot be charged, unless the things furnished, other than the necessities of life, are not sent back when he has it in his power to return them, although he may not then be living with her.⁶⁷

It is his duty to love his wife, and to bear with her faults, and, if possible, by mild means to correct them, and he is required to fulfil towards her his marital promise of fidelity, and can, therefore, have no carnal connection with any other woman, without a violation of his obligations.

As he is bound to govern his house properly, he is liable for its misgovernment, and he may be punished for keeping a disorderly house, where his wife had the principal agency; and he is liable for her torts, as for her slander or trespass.

He is also liable for his wife's debts incurred before coverture, provided they are recovered from him during their joint lives;⁶⁸ and, generally, for such as are contracted by her during coverture. In this latter case she is presumed to act as his agent.

278. Being the head of the family, the husband has a right to establish him-

⁶⁴ 1 Sharswood, Blackst. Comm. 442; Coke, Litt. 112.

⁶⁵ 1 Sharswood, Blackst. Comm. 442.

⁶⁶ 1 Hagg. Cons. 35.

⁶⁷ Waithman v. Wakefield, 1 Campb. 120. The husband must provide his wife with necessities suitable to her condition so long as they cohabit together. If she leaves him for good cause, as for his adultery, and lives separate from him, he must pay the bills she incurs for necessities. Billing v. Pilcher, 7 B. Monr. Ky. 758; Shelton v. Pendleton, 18 Conn. 417; Descelles v. Kadmus, 8 Iowa 51. But he is not responsible, if she leaves him without good cause. Those who give credit to a married woman, living separate from her husband, do it at their peril; they must look to the grounds of the separation. Gill v. Read, 5 R. I. 343; Reese v. Chilton, 26 Mo. 598; Morgan v. Hughes, 20 Tex. 141.

⁶⁸ This liability is in some states limited to the extent of the property received from the wife. N. Y. Stat. 1853, p. 1057; Ind. Rev. St. ch. 52, § 1; Minn. St. 1858, ch. 40; Rennecker v. Scott, 4 Greene, Iowa 185.

self wherever he may please ; in this he cannot be controlled by his wife ; and he may manage his affairs in his own way. He may make whatever contracts may suit him, and acquire and sell property. His real estate, however, will be liable for his wife's dower, unless she releases it according to certain prescribed forms.

During a barbarous age, the husband had the power to correct or whip his wife, in order to bring her into subjection ; this is now considered unlawful in some, and probably all the states of the Union.⁶⁹

279. The wife is bound to love her husband, to be faithful to him, to do all in her power to promote their common interest, to perform toward him all the marital duties. She is bound to follow him wherever he may desire to establish himself within the United States,⁷⁰ unless by acts of injustice, or such as are contrary to his marital duties, the husband renders her life or happiness insecure.

She is not liable to pay any obligations she enters into during the coverture, either for purchases, or for the payment of any money.⁷¹ When she makes a contract for necessities she is presumed to act by authority of her husband, and he alone is liable for them.

This rule applies only to necessities ; the wife is not the general agent of the husband.⁷² She may bind her husband by purchases for the family, and by such other contracts as he has authorized her to make, and authority will be implied from a uniform custom.⁷³ In most of the states married women are now authorized by statute to retain their property and to contract in reference to it, and to do other business as if they were single ; and such contracts bind them and their separate property, but do not bind the husband.

280. When she commits a criminal act, she is responsible as any other person, unless in cases where the crime is not *malum in se*, and it is committed in the presence of her husband.⁷⁴ But if it appear she acted independently of him, she will be responsible even in such a case.⁷⁵

She is liable for her torts, as though she were not married ; as trespass, slander, and the like.

281. She has a right to the love and affection of her husband, to such part of his fortune as may be necessary and proper, taking his circumstances into consideration.⁷⁶ But this is only upon the condition that she fulfil her own duties ; for, if she were to elope with another man, she would not be entitled to his alimony.⁷⁷

282. The duties of parents toward their children vary according to the fact whether they are legitimate or illegitimate. These will be separately considered.

A child born during the coverture, whether conceived before or after marriage, is presumed to be the child of the husband and wife. This presumption is, however, merely a presumption of fact, and may be rebutted by any proof which shows that the husband cannot be the father.⁷⁸ But the mother is not

⁶⁹ See 1 Sharswood, Blackst. Comm. 444.

⁷⁰ Chretien v. Her Husband, 5 Mart. N. S. La. 60.

⁷¹ Jackson v. Vanderheyden, 17 Johns. N. Y. 167.

⁷² Brown v. Hannibal R. R. 33 Mo. 309 ; Gilbert v. Plant, 18 Ind. 308 ; Johnston v. Pike, 14 La. Ann. 731 ; Tryon v. Sutton, 13 Cal. 490.

⁷³ White v. Oeland, 12 Rich. So. C. 308.

⁷⁴ Roscoe, Cr. Ev. 785 ; Commonwealth v. Neal, 10 Mass. 152 ; Martin v. Commonwealth, 1 Mass. 347 ; Commonwealth v. Trimmer, 1 Mass. 476.

⁷⁵ Hale, P. C. 516 ; 1 Russell, Cr. 16, 20 ; State v. Collins, 1 M'Cord, So. C. 355 ; Jones v. State, 2 Blackf. Ind. 484 ; State v. Nelson, 29 Me. 329.

⁷⁶ Bascom v. Bascom, Wright, Ch. Ohio, 362 ; Chunn v. Chunn, 1 Meigs, Tenn. 139.

⁷⁷ Holmes v. Holmes, Walk. 474 ; see Daily v. Daily, Wright, Ch. Ohio, 514.

⁷⁸ Commonwealth v. Shepherd, 6 Binn. Penn. 283.

allowed to testify that the husband had no intercourse with her when the child was begotten, though this happened before marriage.⁷⁹

283. A *legitimate child* is one who is born in lawful wedlock, or within a competent time afterward. It is a principle of the common law, that when a child is born during the coverture of his mother, her husband is presumed to be the father: *Pater is est quem nuptiæ demonstrat*.⁸⁰ But this presumption may be rebutted.⁸¹

284. The principal obligations which parents owe their children are their maintenance, their protection, and their education.

Parents are bound to *maintain* their children. In the first place will be considered who is bound; secondly, what the maintenance shall be; and, thirdly, when it shall cease.

The obligation to maintain children arises from one of the first laws of nature, which the civil law seconds and sanctions. This right of support, and the duty corresponding to it, extend to the father, grandfather, mother, and grandmother, and other ascendants. If neglected, this duty will be enforced by the courts, provided the parties are of sufficient ability.⁸²

The obligation of parents to support their children extends to the necessities of life, including food, lodging, and clothing, in a just proportion between the wants of the child and the ability of the parents. Nothing fixed or certain can be demanded; there is always something relative in ascertaining the amount due.

No parent is bound to provide a maintenance for his issue, unless the children are impotent and unable to work, either through infancy, disease, or accident. Hence it follows, that when a child has attained an age sufficient to support himself, has been restored to ability, or has been cured from disease, the parents are no longer bound to support him.⁸³

285. A parent is bound to *protect* his children, but this duty is so well enforced by the law of nature, that it requires but little aid from the civil law. A parent may justify an assault and battery in defense of his child, and he may uphold his children in their quarrels and lawsuits, without incurring the guilt or punishment of the crime of maintenance.

286. The *education* of children is not always enforced by the civil or municipal law. Nature has implanted in the human breast a strong desire to see children prosperous and happy; and it is owing to this that parents spend so much time and money to educate their children. Besides, by the laws of most of the states, the people are educated at the public expense.

287. In treating of *illegitimate children*, we shall consider first the legal duties of parents toward such children; and, second, the rights and incapacities of such children.

288. The father of a bastard child is bound to maintain him during his childhood, until he can maintain himself; on a failure to do so, the public

⁷⁹ *Dennison v. Page*, 29 Penn. St. 420.

⁸⁰ 1 Sharswood, Blackst. Comm. 446; *Tate v. Penne*, 7 Mart. N. s. La. 548, 553.

⁸¹ See beyond, 303, *seq.*

⁸² *Hillsboro' v. Deering*, 4 N. H. 86; *Harland's case*, 5 Rawle, Penn. 323. If a man marries a woman having children by the former marriage, he is not, in general, bound to support them. But if he takes them into his family and treats them as part of the family, he is considered as standing *in loco parentis*, and is liable for their support as long as they remain with him. *Williams v. Hutchinson*, 3 N. Y. 312.

⁸³ 1 Sharswood, Blackst. Comm. 449. The obligation to support a child terminates when he arrives at the age of twenty-one years. Before that time the father cannot relieve himself from his liability by showing that the child is able to support himself. *Litchfield v. Londonderry*, 39 N. H. 247; *Hines v. Mullins*, 28 Geo. 486. By an English statute of 43 Eliz., which is re-enacted in most of the states, the parents, if of sufficient ability, are bound to support their pauper children after attaining their majority.

authorities, guardians or overseers of the poor, or by whatever name they may be known, can, under the statute regulations in the several states, institute proceedings against the father, who is known as the *putative father*.⁶⁴

The mother of a bastard has a right to the control and custody of the child.⁶⁵

289. The rights of bastard children are very few, being principally such as they acquire. They are entitled to be maintained by their putative father; but at common law a bastard is regarded as *nullius filius*, and can inherit neither from his father nor mother. But in most of the states this harsh rule has been modified, and bastards inherit from and through their mother as if they were legitimate.⁶⁶ And he inherits from both parents if legitimated by a subsequent marriage, in many states where this provision is made.⁶⁷ He may gain a name by reputation, though he has none by inheritance. In general the settlement of his mother is his domicile.⁶⁸ Illegitimate children of the same mother do not inherit from each other,⁶⁹ nor from the mother's legitimate children.⁷⁰ It has been held that the legitimate children inherit from an illegitimate child of the same mother, though the father is alive.⁷¹

290. The contract of marriage is dissolved by death and by divorce.

291. Death has the effect of dissolving the marriage; for, by its very terms, it was to continue only till that change should take place. On the death of one party, the other is free to marry again; but decency requires that no marriage should take place till at least the end of one year; and, in the case of women, this time is absolutely requisite in order that it may be known who is the father of any child she might have.

With regard to property, the real estate of the wife and her choses in action are restored to her on the death of her husband; and she has a dower in his real estate, of which he was seised. On her death, her real estate descends to her heirs, unless, under a power, she has made a will devising it, subject to her husband's right by curtesy, when he is entitled to it.

On the death of the wife, the liability of the husband to be sued for her debts, *dum sola*, ceases; and on the death of the husband his representatives are not liable for such debts.

292. In its most extensive sense, the word *divorce* signifies the lawful separation of husband and wife: *Divortium à diversitate mentium dictum est, quia in diversas partes sunt qui distrahunt matrimonium*.⁷²

There are two kinds of divorce, namely, *à mensa et thoro*, which merely separates the parties, without destroying the contract; and the divorce which severs the tie, *quoad fœdus et vinculum*, which is a dissolution of the marriage contract: this is commonly called a divorce *à vinculo matrimonii*.

293. Each state has the power of regulating marriages and divorces within its limits, and can undoubtedly divorce parties who are married and reside within their jurisdiction. But if the parties remove from the state in which they were married to another state, and there obtain a divorce, a question arises how this divorce will be regarded in the former state. If the court granting the divorce has full jurisdiction over the parties as citizens its decree is con-

⁶⁴ Bacon, Abr. *Bastardy*, (E.) Bouvier, ed. It is, in general, necessary that the mother should declare during her travail who the father is, in order to admit her testimony. *Blake v. Jenkins*, 35 Me. 433.

⁶⁵ 2 Kent, Comm. 178; *Robaline v. Armstrong*, 15 Barb. N. Y. 247.

⁶⁶ *Heath v. White*, 5 Conn. 228; *Brown v. Dye*, 2 Root, Conn. 280.

⁶⁷ Beyond No. 324.

⁶⁸ *Newton v. Braintree*, 14 Mass. 382; *Canajoharie v. Overseers*, 17 Johns. N. Y. 41.

⁶⁹ *Allen v. Ramsey*, 1 Metc. Ky. 635; *Bent v. St. Vrain*, 30 Mo. 268.

⁷⁰ *Bacon v. McBride*, 32 Vt. 585.

⁷¹ *Ellis v. Hatfield*, 20 Ind. 101.

⁷² Dig. 24, 2, 2.

clusive.⁹³ If the defendant has never been within the jurisdiction of the court, the divorce is invalid.⁹⁴ The rule in some states is quite lax, but the better opinion is that the court should refuse to entertain a petition for divorce unless both parties have been within its jurisdiction.⁹⁵ The causes for which a divorce will be granted are established by statute, and vary in the different states, and the principal ones are described in the following sections.

294. The divorce *à vinculo* was never granted by the ecclesiastical courts except for the most grave reasons. These, according to Lord Coke, are *causa præcontractus*; *causa metus*; *causa impotentia, seu frigiditatis*; *causa affinitatis*; *et causa consanguinitatis*.⁹⁶

In the United States divorces *à vinculo* may be granted by the legislatures of the several states, for such causes as may be sufficient to induce the members to vote in favor of granting them. But in some of the states the legislatures are prohibited from granting them;⁹⁷ and in others they can be granted by the legislatures only after the courts have granted them for specified causes.⁹⁸

The courts, in nearly all the states, have the power to decree divorces for grave causes, provided for and defined in their acts of assembly. These may be classed into those which occurred before marriage, and those which happened since.

295. The causes which existed *before* marriage are precontract, or the marriage of one of the parties existing at the time of the marriage sought to be dissolved; consanguinity, or that degree of kindred within which marriage is forbidden by law; impotence, when incurable;⁹⁹ idiocy, lunacy, or other mental imbecility, which renders the party subject to it incapable of making a contract; fraud, when it has been exercised to induce the marriage; and in some states, affinity within certain degrees.¹⁰⁰

296. Divorces may also be granted for causes which have arisen *since* the marriage took place, the principal of which are adultery and cruelty.

Adultery, or the criminal carnal connection between one of the spouses and any person of the opposite sex. But if the adultery has been condoned, that is, forgiven by the innocent spouse, which forgiveness is evidenced by cohabitation, a divorce will not be granted.¹⁰¹ Nor will adultery be a sufficient cause for a divorce when the party complaining has been guilty of the same offence.¹⁰²

Cruelty, which consists in those acts which affect the life, the health, or even the comfort of the party aggrieved, and give a reasonable presumption of bodily hurt.¹⁰³

⁹³ *Ditson v. Ditson*, 4 R. I. 87; *Thompson v. State*, 28 Ala. 12.

⁹⁴ *Harding v. Alden*, 9 Me. 140.

⁹⁵ *Shannon v. Shannon*, 4 All. Mass. 134.

⁹⁶ Coke, Litt. 235 a.

⁹⁷ Wisc. Const. art. 4, s. 24.

⁹⁸ Legislative divorces are declared to be unconstitutional in *Teft v. Teft*, 3 Mich. 67; *Bryson v. Bryson*, 17 Miss. 590; *Bingham v. Miller*, 17 Ohio, 445, contra *Wright v. Wright*, 2 Md. 429; *Jones v. Jones*, 12 Penn. St. 350. The court in Kentucky say that the contract of marriage is not within the prohibition in the United States Constitution against laws impairing the obligation of contracts; *Cabell v. Cabell*, 1 Metc. Ky. 319. It seems that, unless restrained by the Constitution, the legislature may grant divorces, but the practice is now unusual, and the question is commonly decided by the courts.

⁹⁹ *Keith v. Keith*, Wright, Ch. Ohio, 518.

¹⁰⁰ Vt. Rev. St. t. 16, c. 63, s. 1.

¹⁰¹ *Barnes v. Barnes*, Wright, Ch. Ohio, 475; *Questel v. Questel*, Wright, Ch. Ohio, 491; Bouvier, Law Dict. *Condonation*; *Quincy v. Quincy*, 10 N. H. 272; *Phillips v. Phillips*, 4 Blackf. Ind. 131; *Hall v. Hall*, 4 N. H. 462; *Marsh v. Marsh*, 2 Beasf. N. J. 281.

¹⁰² *Christianberry v. Christianberry*, 3 Blackf. Ind. 203. A wife who deserts her husband without cause for five years cannot obtain a divorce for his adultery during that time. *Hall v. Hall*, 4 All. Mass. 39.

¹⁰³ *Richards v. Richards*, 37 Penn. St. 225; *Johnson v. Johnson*, 14 Cal. 459; Bouvier, Law Dict. *Cruelty*. By the French law, while divorces were granted, one of the causes was the libel or slander of one of the spouses by the other. In our jurisprudence, I am not aware that the wife has any remedy against her husband for slander.

Desertion, which is the act of one of the spouses in leaving the other, without just cause, for the purpose of causing a perpetual separation. The time which must elapse after the malicious desertion is generally regulated by statute in the several states.

In some states the *condemnation to punishment* for some infamous crime,¹⁰⁴ and being charged with an infamous crime, and a fugitive from justice.¹⁰⁵

Having formed a *connection with some religionists* whose opinions and practices are inconsistent with the duties of marriage, is, in some states, cause for divorce.¹⁰⁶

Refusal on the part of the husband, when of sufficient ability, to *provide necessaries* for the subsistence of his wife, is also a cause for divorce in some states.¹⁰⁷

Habitual drunkenness is also a sufficient cause by statutory provisions in some of the states.¹⁰⁸

297. This divorce severs the marriage tie, and the husband and wife can marry again, in general, as if they never had been married before, provided (in some states) that when they have been divorced for adultery, they shall not marry the partner of their guilt.¹⁰⁹

298. The effects of such a divorce on the property of the wife are various in the several states. When the divorce is for the adultery, or other criminal acts of the husband, in general the wife's lands are restored to her;¹¹⁰ when it is granted for the adultery, or other criminal acts of the wife, the husband has in general some qualified right of curtesy in her lands; when the divorce is the consequence of some pre-existing cause, as consanguinity, affinity, or impotence, in some states, as Maine and Rhode Island, the lands of the wife are restored to her.¹¹¹

A divorce *à vinculo* is in general a *bar to dower*; but in Connecticut, Illinois, New York, and, it seems, in Michigan, dower is not barred by a divorce for the fault of the husband. In Kentucky, when a divorce is caused for the fault of the husband, the wife takes as if he were dead.¹¹²

299. A divorce *à mensa et thoro* is a decree of a competent tribunal that husband and wife shall be separated.

300. This divorce is never granted for causes arising before the marriage. The causes for which it is decreed are, in general, cruelty, desertion, or such other abuses as render the life of the innocent party burdensome.

301. This divorce is a mere separation, and does not affect the rights of the parties as to property. And if the husband is bound by the decree to pay the wife alimony, and he does pay it, he is not responsible for her future debts.¹¹³

In England, it has been expressly decided that a woman divorced *à mensa*

¹⁰⁴ Ark. Rev. St. c. 50, s. 1, p. 333.

¹⁰⁵ La. Act of April 2, 1832.

¹⁰⁶ In Kentucky and Maine, *Dyer v. Dyer*, 5 N. H. 271.

¹⁰⁷ In Vermont and Rhode Island. See *Amsden v. Amsden*, Wright, Ch. Ohio, 66.

¹⁰⁸ *Mahone v. Mahone*, 19 Cal. 627.

¹⁰⁹ Before, **255**. This is also the rule of the civil law. Pothier, Du Mariage. part 3, c. 3, art. 7; 1 Toullier, Dr. Civ. Fr. n. 555.

¹¹⁰ *Estate of Kintzinger*, 2 Ashm. Penn. 455. *Barber v. Root*, 10 Mass. 260; *Star v. Pease*, 8 Conn. 541. In Massachusetts, the interest acquired by a judgment creditor of the husband, by a levy of his execution upon the rents and profits of the wife's real estate, is determined and defeated, by a decree of divorce *à vinculo*, in favor of the wife. *Barker v. Root*, 10 Mass. 260.

¹¹¹ 1 Hillard, Abr. 51, 2.

¹¹² 1 Hillard, Abr. 61, 2.

¹¹³ Bacon Abr. *Baron and Feme* (M); *Ellah v. Leigh*, 5 Term, 679.

à thoro, living separately from her husband, cannot sue or be sued as a feme sole.¹¹⁴ But in Massachusetts, a different rule has been adopted.¹¹⁵

The divorce *à mens et thoro* is only a legal separation, terminable at the will of the parties,—the marriage continuing in regard to every thing not necessarily withdrawn from its operation by the divorce; for example, if there be a divorce *à mens et thoro*, and afterward a legacy be given to the wife, by the common law the husband may release it.¹¹⁶

¹¹⁴ *Lewis v. Lee*, 3 Barnew. & C. 291; see *Lean v. Shultz*, 2 W. Blackst. 1195; *Marshall v. Rutton*, 8 Term, 845; Bacon, Abr. *Baron and Feme*, (M).

¹¹⁵ *Dean v. Richmond*, 5 Pick. Mass. 461. Read the forcible argument of Parker, C. J.

¹¹⁶ *Dean v. Richmond*, 5 Pick. Mass. 468; Bacon, Abr. *Baron and Feme*, (D); 1 Rolle, Abr. 343; *Stephens v. Toly*, Croke, Eliz. 908.

CHAPTER V.

PATERNITY, FILIATION, INFANCY, GUARDIANSHIP, AND LUNACY.

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 - 307. Exceptions to rule that child born in wedlock is child of the mother's husband.
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302. Having examined the forms, obligations, rights, and duties which arise from marriage, and the manner in which it is dissolved, it is natural, in the next place, to explain the principal end of marriage, paternity, filiation, and legitimacy.

Only those children who are born in wedlock, or under the sacred veil of marriage, are *legitimate*. Legitimacy confers on them the rights of family and kindred, of which natural children, born of an illicit union, alike reprov'd by morality and law, are deprived.

Children born of marriages which are absolutely void and null *ab initio* are illegitimate.

It seems, therefore, proper to lay down the rules which point out with certainty, paternity and filiation, either legitimate or illegitimate.

303. *Paternity* and *filiation* are correlative terms, the first of which signifies the quality of father, and the second that of child. Filiation arises from the birth which we receive from such a father or from such a mother.

The mother is always known by evident signs; whether married or not, she is always certain: *mater semper certa est etiamsi vulgò conceperit*.¹ There is not the same certainty as regards the father; the mother is alone certain of the fact, and the relations may not know, or feign ignorance, as to the paternity; the law has therefore established a legal presumption to serve as a foundation for paternity and filiation.

304. When the mother is married, her husband is presumed to be the father of the children born during the coverture; or, if her husband be dead, the presumption is still that he was the father; provided the child has been born within a competent time after the coverture determined. This presumption arises whether the child was conceived during the coverture or before: *pater is est quem nuptiæ demonstrant*.²

The rule is founded on a double presumption: one that there has been a cohabitation between the parents, not only before birth, but before and at the time of the conception of the child; and the other, that the mother has faithfully observed the vow which she made to the husband at the time of marriage. Of these two presumptions, the first one only is essential. The innocence of the mother is always presumed.

It is then the marriage, the actual or presumed cohabitation, and presumption of innocence, always favored by the law, which forms the first principle adopted in relation to filiation, as the foundation of society. The child born in wedlock has for its father the husband of its mother.

305. But a child is conceived a long time before its birth. He lives in *ventre sa mère* before he is born.

He may then be conceived before the marriage, and be born while it subsists. In this case he is presumed to be legitimate, although the marriage may have taken place but a very short time before its birth;³ or, having been conceived during the marriage, it may not have been born until after that contract was dissolved: in this case it will be presumed legitimate, if born within a competent time afterward.

306. In doubtful cases, in order to fix a term before or after which a child shall not be legitimate, recourse was had to another presumption, that the child was born after a certain period of gestation.

By common consent, the courts have fixed the period of gestation, or the time during which the human female who has conceived carries the embryo or fetus in her uterus, at forty weeks, or ten lunar months,⁴ but this may vary

¹ Dig. 2, 4, 5.

² Ibid. 2, 4, 5.

³ 1 Sharswood, Blackst. Comm. 454, 455.

⁴ Cyclop. Pract. Med. vol. 4, p. 87.

one, two, or even three weeks.⁵ In point of fact, however, the duration of human pregnancy is not very certain, and probably is not the same in every woman.⁶ The civil code of Louisiana, copying the code civil Français, has fixed the period of gestation.⁷

There are three classes of cases in which the legitimacy may be contested: conception and birth during the marriage; conception before and birth during the marriage; and conception during the marriage and birth after. These will be examined separately.

307. The rule that the husband of the mother is the father of the child, born in lawful wedlock, or within a competent time after its dissolution, is founded on a presumption; and a presumption is but a conjecture by which we draw from a known fact a consequence, which renders probable a doubtful fact, which we seek to know.

Marriage is the known fact; whence we conclude that the child born during its existence, or within a competent time afterward, is the offspring of the husband. But this consequence being neither necessary nor indubitable, it may not be just; and this presumption, like every other, may therefore be rebutted or disproved.

308. Whenever it is evident that cohabitation cannot have taken place between the husband and wife at the time of conception, the rule cannot apply. This evidence is established.

By proof of the absolute and perpetual *impotence* of the husband; which impotence has been defined to be the incapacity for copulation or perpetuating the species.

The *separation* of the husband and wife during the time in which the woman became pregnant.

Temporary incapacity in consequence of a grave sickness of the husband.

Any other circumstance which shows that the husband *has not cohabited* with his wife.

The fact that at the time of the conception of the child the husband and wife did not cohabit with each other, is a negative fact which cannot be established directly alone. It is established indirectly by proving the impossibility of a contrary fact: for example, it cannot be proved directly that the husband and wife did not cohabit; but if it be proved that the wife was in the United States at the time of conception, and that the husband was travelling in Europe for two years immediately before the birth of the child; or if it be proved that the wife was free and the husband was in prison, and remained unseen by the wife, the fact of non access will be made out by the proof of the absence or the imprisonment.

But this presumption of legitimacy cannot be proved by any thing short of the impossibility of cohabitation.⁸ The proof of the wife's adultery at the time of conception, or declarations by the husband that the child is not his are not admissible.⁹

309. It is a rule of law that the child born during wedlock, but begotten before marriage, is presumed to be legitimate.¹⁰ But the presumption of

⁵ Coke, Litt. 123 b.; 1 Beck, Med. Jur. 478.

⁶ Chitty, Med. Jur. 409; Dewees, Midw. 125; 1 Paris & F. Med. Jur. 218, 230; 1 Foderé, Méd. Leg. § 407-416.

⁷ La. Civ. Code, B. 1, t. 7, c. 2.

Phillips v. Allen, 2 All. Mass. 453.

Hemmenway v. Towner, 1 All. Mass. 209.

¹⁰ 1 Sharswood, Blackst. Comm. 454, 455. In the French law, to raise the presumption of paternity, the child must have been conceived as well as born in lawful wedlock. Niles v. Sprague, 13 Iowa, 198; but see Baker v. Baker, 13 Cal. 87.

paternity may be rebutted by positive proof to the contrary; as, where the husband and wife were white, and the child proved to be a mulatto.¹¹

But the proof must show the impossibility of the husband being the father, as in the cases mentioned in the preceding section.¹²

310. A child born within the time allowed for gestation, namely, forty weeks, is presumed to be legitimate; but there does not seem to be any positive time fixed by the common law on this subject.¹³

311. Proof of filiation may be made in four different ways: by evidence of possession; by the testimony of witnesses; by private writings, and by public registers. Proof may be made against filiation.

312. When the husband and wife have cohabited together as such, and no impotency is proved, the issue is conclusively presumed to be legitimate, though the wife is proved to have been, during that time, guilty of infidelity.¹⁴ After a lapse of thirty years, and the death of all the parties, legitimacy will be presumed on slight proof.¹⁵

313. If the family by their conduct show a tacit recognition of relationship, it will be evidence of it; as, when the father is proved to have brought up the party as his legitimate son, this amounts to the daily assertion that the son is legitimate.¹⁶

314. The fact of the *accouchement* may be proved by the direct testimony of one who was present,—as a physician, a midwife, or other person. This is sufficient to prove the birth, and also the filiation, pedigree, or kindred. But it is not always possible to prove this fact, particularly at a great distance of time, and, in that case, other oral testimony may be given.

315. Although in common cases, hearsay is not evidence, yet in cases of pedigree, such evidence is allowed. By *pedigree* is understood the state of the family as far as regards the kindred of the different members, their births, marriages, and deaths.

In order to ascertain the kindred of an individual, it is material to know how he was treated and acknowledged by those who were interested in him, or sustained the relations of blood or affinity toward him.

This may be proved by evidence of what deceased persons, related to the one in question either by consanguinity or affinity, said of him.¹⁷ And the general repute in the family, proved by the testimony of a surviving member of it, falls within the same rule.¹⁸

316. An *entry* made by a deceased parent or other relation in a *Bible*, family missal, or other book, or in any document or paper, stating the fact and date of the birth of a child or other relative, is regarded as the declaration of such parent, or relative, in a matter of pedigree. The correspondence of deceased members of the family, recitals in family deeds, wills, and other solemn acts, are original evidence in all cases where the oral declarations of the parties are admissible.¹⁹

317. *Public registers*, authorized by law to be kept, such as registers of births

¹¹ *Burden v. Burden*, 3 Dev. No. C. 548.

¹² *Kleinert v. Ehlers*, 38 Penn. St. 439.

¹³ Note by Harg. & Butler to 1 Inst. 123 b.; 1 Rolle, Abr. 356, l. 10; Croke, Jac. 541; Palm. 9.

¹⁴ *Cope v. Cope*, 1 Mood. & R. 269; 1 Greenleaf, Ev. § 28.

¹⁵ *Johnson v. Johnson*, 1 Des. Eq. So. C. 595.

¹⁶ *Beerkeley Peerage case*, 4 Campb. 416; *Viall v. Smith*, 6 R. I. 417; *Kenyon v. Ashbridge*, 35 Penn. St. 157.

¹⁷ *Vowles v. Young*, 13 Ves. Ch. 140; *Whilelock v. Baker*, 13 Ves. Ch. 514; *Jewell v. Jewell*, 1 How. 231; 17 Pet. 213.

¹⁸ *Doe v. Griffin*, 15 East, 203.

¹⁹ *Phillips & A. Ev.* 229; 1 *Phillipps, Ev.* 216; 1 Greenleaf, Ev. § 104.

and marriages, made pursuant to the statutes of any of the United States,²⁰ are admitted as competent evidence of the facts they contain; but they are not evidence of any fact not required to be recorded, and which did not occur in the presence of the officer. A register of baptism, for example, taken by itself, is evidence only of that fact; nor is the mention of the child's age any evidence of the day of its birth, in certain cases.²¹

When the books cannot be procured, an examined copy, duly sworn to, is always admissible.²²

But whether the book itself be produced, or an examined copy, evidence of identity must always be given.

318. *Proof against the legitimate filiation* may be made by evidence that the party is not the child of the mother whom he pretends to be his, and, the maternity being proved, that he is not the child of the husband of the mother.

319. In treating of *natural children* we shall consider, first, who are natural children; and, second, the legitimization of such children.

320. The term *natural children* has two meanings. In contradistinction to legitimate children, it signifies that they are born out of lawful wedlock; and, in opposition to adopted children, it means that they are the actual offspring of their parents. It is only in the first sense here given, that natural children will be considered in this chapter.

Natural children have been divided into three classes; first, those born of persons who were free, and might, at the time of conception, have lawfully married,—these are called simply *natural children*; secondly, those who are the offspring of persons related by consanguinity or affinity within certain degrees, and these are *incestuous natural children*; and, thirdly, those whose parents, or one of them, was married to another person than the father or mother of such children, and these are denominated *adulterous natural children*. These distinctions are unknown to the common law, though they have been adopted in some of the United States.²³ The last two classes cannot become legitimate by any act of their parents.

321. In Louisiana, a further division is made: illegitimate children are classified into those whose fathers are known, and these are strictly called *natural children*; and those whose fathers are unknown, who are called *bastards*.²⁴

322. A natural or illegitimate child is called a *bastard*. A bastard is one who is born of an illicit union, and before the lawful marriage of his parents.

A man is a bastard if born—

Before the lawful marriage of his parents; but although he may have been begotten while his parents were unmarried, yet, if afterward, they married together, and he is born during the coverture, or after it shall have been determined, he is legitimate.²⁵

If begotten and born during the coverture, under circumstances which render it impossible that the husband of the mother can be the father, he will be a bastard. But, unless there is an impossibility that the husband can be the father, the rule that he is so is universal: *pater is est quem nuptiæ demonstrant*.²⁶

A child may be a bastard if born beyond a competent time (generally con-

²⁰ *Milford v. Worcester*, 7 Mass. 48; *Sumner v. Sebec*, 3 Me. 223; *Richmond v. Patterson*, 3 Ohio, 368; *Jackson v. King*, 5 Cow. N. Y. 237; *Stoevers v. Whitman*, 6 Binn. Penn. 416; *Huntley v. Comstock*, 2 Root, Conn. 99; *Woodward v. Spitler*, 1 Dan. Ky. 179.

²¹ *Burghart v. Angerstein*, 6 Carr. & P. 690.

²² 1 Greenleaf, Evid. § 485.

²³ La. Civ. Code, art. 217.

²⁴ *Ibid.* art. 220.

²⁵ 1 Sharswood, Blackst. Comm. 455, 456.

²⁶ Dig. 2, 4, 5.

sidered forty weeks) after the dissolution of the marriage. But the time of gestation is not absolutely fixed by the law.²⁷

323. By the common law of England, adopted generally in the United States, children cannot be legitimized by the subsequent marriage of their parents, because the policy to permit legitimation of such children, it is urged, is against morals, and "a great discouragement to the matrimonial state."²⁸

On the contrary, for the purpose of suppressing concubinage, the Roman emperors established the rule that the subsequent marriage of the parents should legitimate the children:²⁹ in so very different a point of view may the same institution be seen.

The canon law adopted the same rule, and the reason assigned is to favor repentance and a return to good morals, and because it is founded in equity.

324. In this country, several of the states have adopted the rule, and passed statutes, making legitimate children born before the marriage of their parents, but who, after such marriage, have been acknowledged by them.

The subsequent marriage of parents legitimizes the child in Illinois, but he must be afterward acknowledged. The same rule seems to have been adopted in Indiana, Missouri, Louisiana, Vermont, Massachusetts, and Texas.³⁰ An acknowledgment of illegitimate children, of itself, legitimates in Ohio; and, in Michigan and Mississippi, marriage alone, between the reputed parents, has the same effect. In Maine, a bastard inherits from one who is legally adjudged, or in writing, owns himself to be the father. A bastard may be legitimated in North Carolina on application by the putative father to court, either where he has married the mother or she is dead, or married to another, or lives out of the state.

In a number of states, namely, in Alabama, Connecticut, Illinois, Indiana, Kentucky, Maine, Massachusetts, Michigan, North Carolina, Ohio, Rhode Island, Tennessee, Vermont, and Virginia, a bastard takes by descent from his mother, with certain modifications, regulated by the laws of these states.³¹

325. Numerous private laws have been passed to legitimate children born out of lawful wedlock; these laws are enacted at the request of the individuals to be benefitted, and provide for the rights of third persons whom they might otherwise affect.

The state legislatures have power to legitimate children born out of lawful wedlock, so as to enable them to inherit for the future, but cannot deprive the legal heir of an estate already vested in him.³²

326. The family is constituted by marriage, which has been examined in the preceding chapter; and we have also considered the subject of paternity and filiation, or an inquiry into the persons who compose the family. In the next place will be considered paternal power, or the means of maintaining order in the family, by regulating by wise principles this most sacred magistracy, established by nature herself anterior to all laws and agreements or compacts.

But this authority, which receives the sanction of law, ought to be exercised for the protection and direction of the children, and when, by its abuse, it becomes the means of oppression, so far from being supported by law, the parents will be deprived of it.

²⁷ Coke, Litt. 123, a; Harg. and Butler's note to Inst. 123, a; 1 Beck, Med. Jur. 478; Cyclop. Pr. Med. vol. 4, p. 87, art. Succession of Inheritance. In Louisiana the time is fixed; the code has adopted the rule of the French Code Civil. La. Civ. Code, b. 1, t. 7, c. 2. See before, 306.

²⁸ 1 Sharswood, Blackst. Comm. 455.

²⁹ Code, lib. 5, t. 27, l. 5, 6 et 11.

³⁰ Carroll v. Carroll, 20 Tex. 781.

³¹ Hillard, Abr. § 24-35; La. Civ. Code, art. 241.

³² Killam v. Killam, 89 Penn. St. 120.

Naturally this authority belongs to the wife as well as to the husband, but by the policy of law, she does not possess this power, being herself under the power of her husband.

In general the husband is alone vested with parental power over the children, and on his death this authority, subject to certain modifications, is vested in the mother.

327. It will be perceived that every thing relative to paternal power has not been collected under this head: other matter will be found better placed under other heads.

We shall here consider first the general duties of children toward their parents; second, the right of the parents to control their children; third, the right of the father to his son's labor; and, fourth, the power of the father and mother over natural children.

328. The lawful *obligations* enjoined upon children, which they are bound to fulfil toward their parents, are obedience and assistance during their minority; and generally they are bound, by statutory provisions, to maintain their parents who are in want, when they have sufficient ability to do so.³³ Their *duties* are to honor and respect them during their whole lives.

After they arrive at their majority, their obligations cease, if we except that of support,³⁴ but their duties never end.³⁵

329. To enable the parents to perform their duties toward their children, and for their benefit, the law has invested them with considerable authority.

The father has the power to take his children, while in their minority, wherever he will; he may send them to school, place them in college, put them out to a trade, and provide for them as he may think proper.³⁶

But the courts will interfere and deprive the father of the custody and control when he has rendered such interference necessary by his abuse of his power.³⁷

330. But in case of a separation between the husband and wife, if a dispute arises as to the custody of the children, when all things are equal, the courts will give the custody to the father in preference to the mother;³⁸ but whenever the good of the children requires it, they will be delivered to the mother, or even to a stranger.³⁹

331. Parents may correct their children for lawful cause with moderation, and for their good. A malicious whipping could not be justified, and might possibly render the parent amenable to the criminal law.⁴⁰ The right of correction which they possess may be transferred by them to teachers, and to masters with whom the children may be placed, who are to exercise it with

³³ Pothier, Du Mar. p. 5, c. 1, art. 2, § 2; see 2 Kent, Comm. 207. The obligation of the child to support his parent rests entirely upon statute. *Dawson v. Dawson*, 12 Iowa, 512.

³⁴ *State v. Streeve, Coxe*, N. J. 230.

³⁵ After arriving at their majority, the support of the child and his services may be made a matter of contract between him and his father to be paid for, but no such contract is presumed merely from his remaining at home as before; it must be by express agreement. *Putnam v. Town*, 34 Vt. 429; *Brown v. Ramsay*, 5 Dutch. N. J. 117. But see *Kinnebrew v. Kinnebrew*, 35 Ala. 628.

³⁶ *Matter of Wollstencraft*, 4 Johns. Ch. N. Y. 80; *Commonwealth v. Addicks*, 5 Binn. Penn. 520; *ex parte Crouse*, 4 Whart. Penn. 9; *State v. Richardson*, 40 N. H. 272.

³⁷ *Faulk v. Faulk*, 23 Tex. 653.

³⁸ *Hunt v. Hunt*, 4 Greene, Iowa, 216; *Bennett v. Bennett*, 2 Beasl. N. J. 114; *State v. Richardson*, 40 N. H. 272.

³⁹ *Matter of Wollstencraft*, 4 Johns. Ch. N. Y. 80; *Commonwealth v. Nutt*, 1 Browne, Penn. 143; *Commonwealth v. Addicks*, 2 Serg. & R. Penn. 174; *Matter of Kottman*, 2 Hill, N. Y. 263; *United States v. Green*, 8 Mas. C. C. 482; *Wand v. Wand*, 14 Cal. 512; *Gardenhire v. Hinds*, 1 Head. Tenn. 402.

⁴⁰ *Comyn, Dig. Pleader*, 3 M. 19; *Hawkins, P. C. c. 60, s. 23; c. 62, s. 2; c. 29, s. 5.*

moderation, for the benefit of the child; and for any wanton abuse of it, they are liable to punishment.

332. As the father is bound to support his child during his minority, the law gives him, in return, the right to his labor or the fruit of it, while he lives with him and is maintained by him.⁴¹ But this right ceases in the following cases:—

If he puts him out as an apprentice to learn a trade or business, for then the master is entitled to such labor.⁴²

When he neglects to perform his duties of providing for his child, and abandons him, or does any other act from which may be implied an emancipation of the minor. In such case he tacitly authorizes him to labor for others.⁴³

When by an express agreement the father sells to the child the remaining time of his minority,⁴⁴ and if the father knowingly allows his child to contract with third parties and receive his wages himself he is estopped from claiming them.⁴⁵

333. The powers of parents over their natural children are nearly the same as those over their legitimate issue. But they do not owe alimony by the common law to their parents, nor are their parents bound to give them alimony after they have attained their full age.

As to the right of custody, it is in the mother in preference to the father.⁴⁶ Next to her the putative father is entitled to such custody.⁴⁷

334. While children are under age, besides being subject to parental power, they may be under guardians, and we will now consider minority or infancy, and guardianship or tutorship and curatorship.

335. The complete and full development of the physical forces of man, requires a number of years; that of his moral faculties is still slower. No being is less capable to protect himself than man in his infancy; as he grows up, he acquires strength and intelligence, but his growing passions require a regulating experience, which he has not yet attained.

It is then of the utmost importance, to his own interest, that man in his infancy, and until he has attained a sufficient maturity to manage his affairs, should be confided to the care, direction, and advice of guardians capable of protecting him, and serving him for guides. Hence the origin of guardians, whose duties are regulated by law.

336. The person to whom is delegated the authority to take care of an infant or minor, during his minority, is called a guardian of the person; in the civil law, a tutor; when such person is appointed to take care of the property of the minor, he is known by the name of guardian of the estate; in the civil law, the curator. The minor over whom a guardian has been appointed is called a ward; in the civil law, a pupil. The office of a guardian is a guardianship; in the civil law, a tutorship or a curatorship, according to circumstances.

⁴¹ The Etna, Ware, Dist. Ct. 462; Steele v. Thatcher, Ware, Dist. Ct. 91; Stone v. Pulphier, 16 Vt. 428; Lord v. Poor, 29 Me. 569; Shute v. Dorr, 5 Wend. N. Y. 204; Benson v. Remington, 2 Mass. 113.

⁴² Frankfort v. New Vineyard, 48 Me. 665.

⁴³ The Etna, Ware, Dist. Ct. 462; Godfrey v. Hays, 6 Ala. 501; Jenney v. Alden, 12 Mass. 375; Morse v. Welton, 6 Conn. 547; United States v. Mertz, 2 Watts, Penn. 406; Gale v. Parrott, 1 N. H. 28; Campbell v. Campbell, 2 Stockt. N. J. 268.

⁴⁴ 2 Vt. 290; United States v. Mertz, 2 Watts, Penn. 408; Galbraith v. Black, 4 Serg. & R. Penn. 207; Morse v. Welton, 6 Conn. 547; Mason v. Hutchins, 32 Vt. 780. If this agreement is without consideration and not acted on it may be revoked. Abbott v. Converse, 4 All. Mass. 530; Everett v. Sherfey, 1 Iowa 356.

⁴⁵ Smith v. Smith, 30 Conn. 111.

⁴⁶ Commonwealth v. Fee, 6 Serg. & R. Penn. 255; People v. Landt, 2 Johns. N. Y. 375; Carpenter v. Whitman, 15 Johns. N. Y. 208; Wright v. Wright, 2 Mass. 109.

⁴⁷ Commonwealth v. Anderson, 1 Ashm. Penn. 55.

337. The age at which man no longer requires aid and advice for his conduct, is not the same in every individual; some being precocious, and others slow at arriving at maturity; but as the law cannot ascertain all these diversities, a period has been fixed which is uniform as to all.

338. The time fixed by law when all individuals of both sexes arrive at their full age, and acquire fully all their political and civil rights, is the completion of their twenty-first year.⁴⁸

But it is to be observed that by the civil computation of time, which differs from the natural computation, a man is reputed to be twenty-one years of age, the first instant of the last day of the twenty-first year next before the anniversary of his birth, because the last part of the day having once commenced, it is considered as ended.⁴⁹ If, for example, a person were born at any hour of the first day of January, 1830 (even but a few minutes before twelve o'clock of the night of that day), he would be of full age at the first instant of the thirty-first day of December, 1850, although nearly forty-eight hours before he had actually attained the full age, according to years, months, days, hours and minutes, because there is, in this case, no fraction of a day.⁵⁰

339. There are several kinds of guardians: these must be particularly described and distinguished; to benefit the ward, the guardian must be a man capable of protecting and taking care of him; the guardian is required to perform a variety of duties, and is bound by certain obligations; his power must end. These several subjects will be examined in order.

340. Of the several kinds of guardians at common law, some are obsolete, and others have been superseded. They will be here enumerated, together with others created by statute.

341. *Guardian by nature* is the father, and, on his death, the mother;⁵¹ this guardianship extends only to the custody of the person,⁵² and continues till the child shall arrive at the age of twenty-one years.⁵³

Guardianship by nature must not be confounded with paternal power; the former is instituted in favor of the child and is a burden; the latter is a right, and is in favor of the father and mother.

A guardian by nature has no power to lease the lands of the infant,⁵⁴ nor to receive a legacy due to him.⁵⁵

342. *Guardian by nurture* is one who becomes guardian when the infant is without any other, and the right belongs exclusively to the parents, first to the father, and then to the mother.⁵⁶ It extends only to the person, and determines at the age of fourteen years. This species of guardianship has become obsolete.⁵⁷

343. *Guardian in socage* is one who has the custody of the infant's lands as well as his person. This guardianship was given by the common law to the next of blood of the child to whom the inheritance could not possibly descend. This species of guardianship has become obsolete, and never perhaps existed

⁴⁸ Coke, Litt. 171.

⁴⁹ Savigny, Dr. Rom. § 182.

⁵⁰ Herbert v. Torball, 1 Sid. 162; 1 Kehl. 589; 1 Sharswood, Blackst. Comm. 464; 1 Lill. 57; Comyn, Dig. *Enfant A*; Savigny, Dr. Rom. §§ 383, 384; Coventry, Conv. Ev. 182; State v. Clarke, 3 Harr. Del. 557; Hamlin v. Stevenson, 4 Dan. Ky. 597.

⁵¹ The mother of a bastard child is its natural guardian. Somerset v. Dighton, 12 Mass. 383.

⁵² Genet v. Talmadge, 1 Johns. Ch. N. Y. 3; Miles v. Boyden, 3 Pick. Mass. 213; Hyde v. Stone, 7 Wend. N. Y. 354.

⁵³ Coke, Litt. 84 a; South v. Williamson, 1 Harr. & J. Md. 147.

⁵⁴ May v. Calder, 2 Mass. 55; Anderson v. Darby, 1 Nev. & M. 369.

⁵⁵ Miles v. Boyden, 3 Pick. Mass. 213. ⁵⁶ Kline v. Beebe, 6 Conn. 494.

⁵⁷ At common law guardianship by nurture extended to the younger children, not heirs apparent; guardianship by nature extended only to the heir apparent. As in this country all the children are heirs, the former is merged in the latter.

in this country, for the guardian must be a relation by blood who cannot possibly inherit, and such case must rarely exist.⁵⁸ It ceases at the age of fourteen years.⁵⁹

344. Testamentary guardians. The stat. of 12 Car. II, c. 24, the principles of which have been re-enacted generally throughout the United States, gave power to the father to appoint a guardian for his children by his last will and testament.⁶⁰ And a guardian may be appointed whether the child be *in esse* or *in ventre sa mère*. These guardians supersede the claim of any other, and extend to the person, and real and personal estate of the child. They continue till the child arrives at full age.⁶¹ It does not appear to be settled whether the marriage of a testamentary female ward would determine the guardianship before she acquired her full age.⁶²

In Connecticut the father cannot appoint a testamentary guardian.⁶³

345. Guardians appointed by the courts, by virtue of some statutory power. These are either guardians of the person, tutors; or guardians of the estate, curators. The distinction of guardians by nature and in socage appears to have become obsolete; they have been essentially superseded in practice by the appointment of guardians by courts of chancery, orphans' courts, probate courts, and such other tribunals as have jurisdiction to make such appointments.

If the infant has arrived at the age of fourteen years he may select his own guardian, and he may upon arriving at that age apply to the court for the removal of his guardian and the appointment of a new one, but this is subject to the discretion of the court.⁶⁴ The validity of the appointment of a guardian by a competent court cannot be questioned in a collateral proceeding.⁶⁵

346. A guardian *ad litem* is one appointed by the court, when an infant is sued in a civil action or proceeding, to defend him in the same. Every court, when an infant is sued in a civil action, has the power to appoint a guardian *ad litem*, when he has no guardian, for, as an infant cannot appoint an attorney, he would be without a remedy if such a guardian were not appointed. The power and duty of a guardian *ad litem* are confined to the defence of the suit.⁶⁶ A guardian *ad litem* differs from a *prochein ami*, or next friend, who, without being appointed guardian, sues in the name of the infant for the recovery of the rights of the latter, or does such other acts as are authorized by law.⁶⁷

347. As the guardian is a mandatary⁶⁸ appointed by law, to act in the place of the minor or infant, it is requisite that he should be *sui juris* and capable of performing the duties of his appointment.⁶⁹ He cannot have any interest

⁵⁸ *Combs v. Jackson*, 2 Wend. N. Y. 153; *Fonda v. Vanhorne*, 15 Wend. N. Y. 631; *Putnam v. Ritchie*, 6 Paige, Ch. N. Y. 390.

⁵⁹ *Byrne v. Van Hoeson*, 5 Johns. N. Y. 66.

⁶⁰ *Balch v. Smith*, 12 N. H. 437; *Copp v. Copp*, 20 N. H. 284.

⁶¹ They are not liable to be removed by the court and a new guardian appointed when the ward is fourteen years old, except for good cause. *Sessions v. Kell*, 30 Miss. 458.

⁶² *Mendes v. Mendes*, 1 Ves. Ch. 89; *Reeve, Dom. Rel.* 328; 2 Kent, Comm. 225; beyond, No. 362.

⁶³ *Swift*, Dig. Conn. 48.

⁶⁴ *Lee's Appeal*, 27 Penn. St. 229; *Ham v. Ham*, 12 Gratt. Va. 74; *Dibble v. Dibble*, 8 Ind. 307.

⁶⁵ *Martin v. Jones*, 12 La. Ann. 168; *Warner v. Wilson*, 4 Cal. 310.

⁶⁶ *Fitzherbert*, Nat. Brev. 27; *Coke*, Litt. 88 b, n. 16, 135 b, n. 1; *Bacon*, Abr. *Bouvier* ed., *Guardian*; *Waterman v. Lawrence*, 19 Cal. 210. If the infant's interest requires it, a guardian *ad litem* will be appointed even when there is a general guardian. *Gronfier v. Pymiroil*, 19 Cal. 629; *Alexander v. Frary*, 9 Ind. 481.

⁶⁷ *Commonwealth v. Roach*, 1 Ashm. Penn. 27; *Edwards*, Part. 182-204. An infant plaintiff must sue by *prochein ami*, and in this case no guardian *ad litem* is ever appointed. *Clark v. Platt*, 30 Conn. 282.

⁶⁸ *Granby v. Amherst*, 7 Mass. 1; *Manson v. Felton*, 13 Pick. Mass. 206.

⁶⁹ *Coke*, Litt. 886; *Bacon*, Abr. *Guardian*, B.

adverse to that of his ward, and if he is known to have any such, he will not be appointed.

An executor of an estate will not be appointed guardian of an infant who claims such estate, because they may have different interests, and the law does not put the duties of a man in opposition to his interest.⁷⁰

A person under his full age, or a minor, cannot of course be appointed to take care of another minor.

A married woman may be a guardian,⁷¹ but not without the consent of her husband.

348. The administration of a general guardian extends over the person and the property of the ward. In the first place let us examine what concerns the person; and, second, the duties which relate to the property of the ward.

349. In general the guardian stands to the ward *in loco parentis*; but he is not so in every respect, as for example, the father is entitled to his son's labor; on the contrary, if the ward earns anything it is not for the benefit of the guardian, but his own.⁷² All the acts of the guardian are to be for the benefit of the ward. He is bound

To take care of the person of the ward;

To exercise, when needful, proper power of restraint;

To place him apprentice or in some situation to earn his own living;

To represent him in all civil acts, and in actions.

The care of the person includes the obligation to provide for the support and education of the ward, and generally the guardian may use a sound discretion in these respects; but in cases of doubt or difficulty he may apply to the competent tribunal for directions.⁷³

The guardian may properly restrain his ward from acts which are illegal or improper,⁷⁴ and he is generally authorized to place him out apprentice, but in this he will use the precaution of consulting the mother, if living, or if not, some other relatives of the ward. The business to which the minor is bound must be a proper one; a guardian cannot bind his ward as a servant, unless by authority of some statute.⁷⁵

He is bound to appear for him in all cases in which he sues or is sued, because the ward cannot appoint an attorney.⁷⁶

He may reasonably change his ward's residence.⁷⁷

350. The acts of the guardian in relation to the property of his ward may be divided into two classes, namely, when he acts alone and of his own authority; and when he acts under the direction of a competent tribunal.

351. He may perform alone all acts of simple administration which do not extend beyond the time during which he is to be guardian; for example, he may lease the minor's real estate, but the lease must not extend beyond the time when the ward will be of full age.⁷⁸ As he is, in all these acts, the legal

⁷⁰ Jackson v. Sears, 10 Johns. N. Y. 435.

⁷¹ Cook v. Bybee, 24 Tex. 278; Ex parte Maxwell, 19 Ind. 88; Farrer v. Clark, 29 Miss. 195.

⁷² But see Bass v. Cook, 13 Ala. 390.

⁷³ Harris v. Richardson, 4 Dev. No. C. 279; Ex parte Ralston, R. M. Charl. Ga. 119; Bybee v. Thorp, 4 B. Monr. Ky. 313. The guardian is not bound personally to pay for his ward's maintenance, but only to apply his ward's property for that purpose. Spring v. Woodworth, 4 All. Mass. 326, and he cannot by advancing his own means for this purpose make the ward his debtor. Preble v. Longfellow, 48 Me. 279; Frost v. Winston, 32 Mo. 489. Where a father without property is guardian of his children who have property, he may charge their estates with part of the expense of their maintenance. Harring v. Coles, 2 Bradf. Surr. N. Y. 349.

⁷⁴ Wood v. Gale, 10 N. H. 247.

⁷⁵ Respublica v. Keppelle, 1 Yeates, Penn. 233.

⁷⁶ Gronfier v. Puymirrol, 19 Cal. 629.

⁷⁷ Ex parte Bartlett, 4 Bradf. Surr. N. Y. 221.

⁷⁸ Ross v. Gill, 4 Call, Va. 250; Truss v. Old, 6 Rand. Va. 256.

mandatary and representative of the ward, they have the same binding force as if they had been performed by the minor himself after he had attained his age of twenty-one years. Hence the maxim of the Roman law, which is founded in reason, *tutor domini loco habetur*.⁷⁹

His first duty is to make an inventory of all the property of his ward. This inventory should contain in detail a list of all the goods and claims belonging to his ward. And for all personal property which the guardian receives he must account, either for its value when he has parted with it and it cannot be found, or for the articles themselves when they are in his hands. As the guardian may sell or dispose of the personal estate, goods which he has sold for the purpose of the trust cannot be recovered by the ward in an action against the purchaser.⁸⁰

352. With regard to the real estate, it may be observed that the guardian has no further control with, or concern over, the real estate than what relates to the leasing of it, and receiving the rents and profits, and keeping it in order. He may lease it, as has been observed, for the term during which he has a right to control it, and no longer.⁸¹

353. Guardians will not be permitted to turn the personal property of an infant into real property or real property into personalty, because it may not only affect the rights of the infant, but also of his representatives, if he should die under age.⁸² If the guardian should, under particular circumstances, make a change beneficial to the infant, such as the court would have ordered, it will afterward be sanctioned by the court.⁸³

354. As the guardian is bound to render an account, he is required to keep one. He cannot reap any benefit from the use of the ward's money, nor do anything adverse to his interest. If he settles a debt upon beneficial terms, or purchases a claim against the ward at a discount, he does not receive the benefit, but it accrues to the ward.⁸⁴

355. For any wasteful expenditures the guardian would not probably be allowed; but the court would not weigh these in golden scales if the guardian acted in good faith.

356. Power is given to various tribunals, known by different names in the several states, to direct guardians in many instances, and to authorize them to perform acts which are of too much importance to be trusted to a single individual. Among these are the power to sell the real estate of the minor, to make improvements, and to spend certain sums beyond the income of a minor's estate for his support and on his account.⁸⁵

Sometimes, too, money ought to be invested in certain securities; the courts have in general authority to approve of such investment, and if the money happen to be lost, the loss will fall upon the ward and not upon the guardian, who has received the sanction of the court.

⁷⁹ Dig. 26, 7, 27.

⁸⁰ See *Bonsall's Case*, 1 Rawle, Penn. 266; *Field v. Scheffelin*, 7 Johns. Ch. N. Y. 150; *Ellis v. Essex M. Bridge*, 2 Pick. Mass. 263; *Bowman's Appeal*, 3 Watts, Penn. 369. In California the guardian cannot sell even the personal estate of the ward without an order of court. *Kendall v. Miller*, 9 Cal. 591.

⁸¹ *Genet v. Tallmadge*, 1 Johns. Ch. N. Y. 561; *Jones v. Ward*, 10 Yerg. Tenn. 160; 7 Johns. Ch. N. Y. 154; *Doe v. Hodgson*, 2 Wils. 129; *Snook v. Sutton*, 5 Halst. N. J. 133; *Bacon, Abr. Leases*, etc. I, 9.

⁸² 1 *Fonblanque Eq. B. 1, c. 2, § 5*, note (b), *Jackson v. Todd*, 1 Dutch. N. J. 121; *Stall v. Manchester*, 9 Ohio 19; *Merchant v. Sunderlin*, 3 Ired. No. C. 501; *Ex parte Crutchfield*, 3 Yerg. Tenn. 336.

⁸³ *Inwood v. Twyne*, Ambl. Ch. 417; 2 Ed. Ch. 148.

⁸⁴ 2 Kent, Comm. 229.

⁸⁵ These proceedings in court are ex parte, and the ward is not made a party. *Davidson v. Lindsay*, 16 Ind. 186; *Fitzgibbon v. Lake*, 29 Ill. 165. The ward must be a party; *Moore v. Hood*, 9 Rich. Eq. So. C. 311.

And it is the duty of the guardian to obtain the consent of the court before investing his ward's property.⁸⁶

357. The guardian is required to furnish an account to the tribunal which has jurisdiction of such matter whenever called upon, but always at the determination of his guardianship. During the minority of the ward, any one acting as the next friend of the ward may call upon the guardian to file his account for proper cause shown.

In this account must appear all the transactions which have taken place between the guardian and the ward,⁸⁷ and if the guardian were indebted in his individual account to himself as guardian, he will be presumed to have received the amount in his capacity of guardian.⁸⁸ It should contain all the moneys which have come to his hands, the dates when received, and show how the money has been employed. On the other hand, it ought to state all the moneys disbursed, for what purpose they have been paid out, the date when paid, and to whom. Interest ought to be charged on both sides.⁸⁹ The guardian is entitled to commissions, the amount of which is regulated by the courts in proportion to his trouble and risk; but he is not allowed to pay any one for the management of the estate, which he ought to have done in person.⁹⁰

When one person is guardian of several wards, he is required to keep separate accounts with each.⁹¹

The guardian's accounts are fixed in court, but are not settled until the ward arrives at his majority and the guardianship has ceased. If settled soon after that time, they are *prima facie* correct, but are not favored, and may be impeached by the ward for any want of good faith on the guardian's part.⁹²

358. The duties of a guardian cease by lapse of time; by the removal or discharge of the guardian by a competent tribunal; by the death of the ward or guardian; and by operation of law.

359. A guardian may be appointed by testament until the minor shall attain a certain age, or until a condition shall be fulfilled; as for example, an appointment until the minor shall attain his age of fourteen years, and then allowing him to choose his own guardian under the authority of a competent court; or until another one of the testator's children shall arrive of full age, and that from that time the elder shall be guardian of the younger.

At common law, if a guardian be appointed for a child under fourteen years old, his duties and obligations cease when the infant arrives at the age of fourteen years, and chooses another guardian in his place.⁹³ But until another is appointed, the first shall act.⁹⁴

The guardianship ends, of course, when the minor attains his full age of twenty-one years, for no authority can be exercised over a freeman *sui juris*.

360. A guardian may be discharged at his own request, upon good cause shown, such as inability from age or other cause to attend to the duties of the trust; but this is never done until he has filed an account and offered to pay the balance in his hands to his successor.

⁸⁶ *Carlyle v. Carlyle*, 10 Md. 440; *Sherry v. Sansberry*, 3 Ind. 320.

⁸⁷ *Crowell's Appeal*, 2 Watts, Penn. 295.

⁸⁸ *O'Neill v. Herbert*, Dudl. Eq. So. C. 30; *Johnson v. Johnson*, 2 Hill, Ch. So. C. 285; *Neill v. Neill*, 31 Miss. 36.

⁸⁹ *Hayward v. Ellis*, 13 Pick. Mass. 272; *Karr v. Karr*, 6 Dan. Ky. 3; *Hendricks v. Hudleston*, 5 Smedes & M. Ch. Miss. 422.

⁹⁰ *Eichelberger's Appeal*, 4 Watts, Penn. 84.

⁹¹ *Baker v. Richards*, 8 Serg. & R. Penn. 12. See *Hampton's Case*, 17 Serg. & R. Penn. 144.

⁹² *Sullivan v. Blackwell*, 28 Miss. 737; *McClellan v. Kennedy*, 8 Md. 230; *Hawkin's Appeal*, 32 Penn. St. 263.

⁹³ 1 *Sharswood*, Blackst. Comm. 463.

⁹⁴ 7 *Cow. N. Y.* 36; *Byrne v. Van Hoesen*, 5 Johns. N. Y. 66.

He may be removed by the court for cause shown, for example, that he is wasting or mismanaging the estate; that he refuses or neglects to give security when ordered to do so by the court; and habitual drunkenness, as evidence of mismanagement, has been holden to be a sufficient cause.⁹⁶

361. On the death of the guardian those who represent him are required to give such an account of his guardianship as it is in their power to make. And if two persons are appointed guardians for one ward, during his minority, or until further order, the guardianship is at an end on the death of one of them, and there must be a new appointment.⁹⁶

Immediately on the death of the ward all the guardian's functions cease, because the property in his hands has become, by that event, vested in others. The guardian is then required to make out his account.

362. When a female ward marries, at common law the guardianship determines, because immediately on the marriage, the husband becomes her guardian; for it would be inconsistent with the marital rights that any one should have the control of another man's wife.⁹⁷

The guardianship determines also when a feme sole guardian marries.⁹⁸

363. The rule that a man attains his majority at the age of twenty-one years accomplished, is perhaps universal in the United States. At this period every man is in the full enjoyment of his civil and political rights; he has no other guardian than the law, which watches over all alike. He is released from all legal personal ties whatever, which he owed to others on account of his infancy, but he is bound by duty to respect and honor his parents.

364. But owing to the infirmities of human nature, and to accidents, to which all men are subject, the law has wisely provided for the protection of those who are unable to take care of themselves. When, therefore, an individual loses his reason, or otherwise becomes incapable of governing himself, the law provides a guardian, or committee, to take care of his person and estate, and deprives him of this general right of self-government.

365. It is to be observed that sanity is always presumed, and that the party who alleges insanity, must prove it, except when it has once been established, and then it must be shown not to exist.⁹⁹

366. Before a person can be deprived of his civil and political rights, on the ground of insanity, an inquisition must be found, in due form of law, that he is of unsound mind, and the court must give it the sanction of their judgment; then the party is deprived of the right of making contracts, and can exercise no civil or political rights, and in general is not criminally responsible for his acts. This state, in the civil law, is called *interdiction*.

367. It will be proper to inquire for what causes a party may be interdicted, or when a commission of lunacy will issue or an inquisition be found; into the proceedings in lunacy; of the consequences of finding a man *non compos*; and of the restoration of the lunatic.

368. The causes for which a commission will be issued and an inquisition found are those which arise from a defect of the understanding; and those

⁹⁶ *Kettletas v. Gardner*, 1 Paige, Ch. N. Y. 488.

⁹⁷ *Bradshaw v. Bradshaw*, 1 Russ. Ch. 528.

⁹⁸ 2 Inst. 260; *Kettletas v. Gardner*, 1 Paige, Ch. N. Y. 488. See *Matter of Whitaker*, 4 Johns. N. Y. 378; *Roach v. Garvan*, 1 Ves. Ch. 159; *Burr v. Wilson*, 18 Tex. 367; before No. 344.

⁹⁹ *Field v. Torrey*, 7 Vt. 372; *Contra Carlisle v. Tuttle*, 30 Ala. n. s. 613.

¹ *Hale*, P. C. 33; *Shelford*, Lun. 36; *Armstrong v. Tinnons*, 3 Harr. Del. 342; *Jackson v. Van Dusen*, 5 Johns. N. Y. 144; *Lee v. Lee*, 4 McCord, So. C. 183; *Jackson v. King*, 4 Cow. N. Y. 207; *State v. Starling*, 6 Jones, No. C. 366; *Wray v. Wray*, 33 Ala. n. s. 187; *Newcomb v. State*, 37 Miss. 383; *Baxter v. Abbott*, 7 Gray, Mass. 71; *Menkins v. Lightner*, 18 Ill. 282.

which are the effect of bad habits, which the unfortunate subjects of them cannot control. They will be severally examined.

369. By *non compos mentis* is meant that state of the intellect which renders a person of unsound mind, memory and understanding. This is a generic term, and includes all the species of madness, whether such madness arise from idiocy, sickness, lunacy, or drunkenness. It is nearly similar to insanity.¹⁰⁰

370. *Insanity* is a continued impetuosity of thought, which for the time being unfits a man for judging and acting in relation to the matter in question, with the composure requisite for the maintenance of the social relations of life. But it is almost impossible to give any satisfactory definition of insanity, which shall, with precision, include all cases of insanity and exclude all others.¹⁰¹

371. *Unsoundness of mind*, or unsoundness of memory, are expressions which have been used in several statutes, and sometimes indiscriminately, to signify not only lunacy, but permanent adventitious insanity, as distinguished from idiocy.¹⁰²

372. *Idiocy* is that condition of mind in which the reflective, or all or part of the reflective powers, are either entirely wanting, or are manifested to the least possible extent. It is generally the consequence of organic defect. But although a person may have a weak mind, yet if he appears to be capable of acquiring by conversation and instruction such a competent understanding as to enable him to govern himself and his estate, and a memory sufficient to retain the knowledge which he may acquire, he is not to be considered in law as an idiot.¹⁰³ According to Lord Coke, persons born deaf, dumb and blind, are to be considered as idiots, because the senses which are the inlets of knowledge, are closed.¹⁰⁴ But science had not in his time yet been able to teach such unfortunate beings. Now, such persons being taught not only to comprehend others, but to convey their ideas by writing,¹⁰⁵ would probably be considered as persons born deaf and dumb who can write, and convey their ideas.¹⁰⁶

373. *Lunacy* is a disease of the mind, which is differently defined as it applies to a class of disorders, or only to one species of them. As a general term, it includes all the varieties of mental disorders, not fatuous; in this sense, it is synonymous with *non compos mentis*, or of unsound mind. But in a more restricted sense, lunacy is the state of one who has had understanding, but who, by disease, grief or other accident, has lost the use of his reason.¹⁰⁷

374. *Imbecility* is that state of an individual who is of such weak mind, that, without having entirely lost his reason, he is unable to govern his person or manage his property. Imbecility and weakness of mind may exist in different degrees, between the limits of absolute idiocy on the one hand, and perfect capacity on the other.¹⁰⁸

375. *Demency* is the condition of one who is habitually deprived of reason.

376. *Habitual drunkenness* is also such a malady, that, in some states, by statutory provisions, it is a sufficient cause for supporting a commission of lunacy, or a commission in the nature of a commission of lunacy.

377. Being a *spendthrift*, is, in some states, a sufficient cause for depriving him of his civil rights. He is described in a statute to be a person, who, by excessive drinking, gaming, idleness, or debauchery of any kind, shall so spend,

¹⁰⁰ Coke, Litt. 247; 4 Coke, 124; 1 Phill. Eccl. 100.

¹⁰¹ Ray, Med. Jur. § 24.

¹⁰² Lord Ely's case, 1 Ridgw. App. Ir. 518; 3 Atk. Ch. 171.

¹⁰³ Lord Ely's case, 1 Ridgw. App. Ir. 522.

¹⁰⁴ Coke, Litt. 42 b.

¹⁰⁵ A young woman named Laura Bridgeman, born deaf, dumb and blind, could read by means of touch, and wrote a very good hand, when seen by the author at the Blind Asylum in South Boston.

¹⁰⁶ Dickinson v. Blisset, 1 Dick. Ch. 268. See Brower v. Fisher, 4 Johns. Ch. N. Y. 441.

¹⁰⁷ 1 Sharswood, Blackst. Comm. 304; Ex parte Vanauken, 2 Stockt. N. J. 186.

¹⁰⁸ Shelford, Lun. 6; Stock, Non. Comp. Men. 5; Dods v. Wilson, Const. So. C. 448

waste, or lessen his estate, as to expose himself or his family to want and suffering, or expose the town to charge and expense, for support of himself and family.¹⁰⁹

378. In order to support a commission of lunacy, there must be proof that the individual is of such unsound mind, that he is unable to take care of his person and to manage his estate. If he can do this, it does not matter how eccentric he may be in other respects. He who is mistaken in speculative ideas, palpably false, is a visionary man, but, if he can take care of his person and manage his estate, he cannot be found to be of unsound mind. Insanity is not always obvious; on the contrary, it is frequently extremely difficult to detect it, as it often eludes the grasp of the observer; whether it did or did not exist at a particular period, is oftentimes a perplexing question to courts and juries.¹¹⁰

379. The state of unsoundness of mind must have been *habitual*. A man is not to be condemned for isolated acts, for the wisest is sometimes absent. Sickness, a violent passion, a great affliction may temporarily eclipse the clearest mind. But when a man is habitually unreasonable, and his mind manifests itself in a healthy state only by intervals, and the language and the daily acts of the individual are those of an insane man, then there is an habitual state of demency.¹¹¹

But although, in order to found proceedings in lunacy, it is requisite that the insanity should be habitual, yet it is not necessary it should be continued. Some are crazy who have lucid intervals, during which they appear to have their reason, but these lucid periods not being habitual, they are not the less liable to a commission of lunacy.

380. As the finding a man a lunatic deprives a citizen of the free exercise of his rights; as it takes away from him the use and disposition of his property, and frequently of his liberty and of his actions; and as it also causes him extreme displeasure, and is injurious to his reputation, it ought to take place only in cases of necessity, and when his own interest, rather than that of his family, requires it, for his interest is in general alone considered. But, when the man is so crazy that he becomes dangerous to society, the commission of lunacy is issued, and the inquisition is found more for the benefit of society than for the advantage of the crazy man.¹¹²

381. Upon principle, it seems that a commission of lunacy ought not to be issued against an infant, because, in general, as the court has power over the infant and his estate, the proceeding seems unnecessary; but such a commission has been issued upon the ground that, under certain circumstances, there would be more ample power given in lunacy in managing the estate of the ward.¹¹³

382. The proceedings in lunacy are regulated by statute in the different states, and are taken by courts of chancery, probate or surrogate's courts, or such other tribunal as may be invested with power in the matter. A judicial proceeding is in general necessary to authorize any one to take charge of a lunatic's person or property, but if it is necessary a parent or a husband may cause his child or wife to be confined in an insane asylum, taking care to exercise no unnecessary restraint or improper treatment.¹¹⁴ As this power may cause great injustice by its abuse, it is not favored by the courts, and if the restraint is improper all the guilty parties are liable both civilly and criminally.

The modes of proceeding vary in the different states, and we can only give an outline of the method followed in England and adopted in many of the states.

¹⁰⁹ Vt. Rev. St. t. 16, c. 65, 19.

¹¹⁰ Singleton's Will, 8 Dan. Ky. 221.

¹¹¹ See *Cornwell v. Tennessee*, Mart. & Y. Tenn. 147.

¹¹² *Shenango v. Wayne*, 34 Penn. St. 184.

¹¹³ *Shelford*, Lun. 90, 91.

¹¹⁴ *Denny v. Tyler*, 3 All. Mass. 225.

383. The right to apply for a commission of lunacy is inherent in the father or mother against the child, and *vice versa*. A husband may prefer a petition against his wife, and *vice versa*. And any other relation, or even a stranger has been allowed to present a petition for that purpose.¹¹⁵ But the nearest relations of an alleged lunatic will be preferred to strangers, unless there be a special cause.¹¹⁶

In the absence of relations, or when the public security requires it, as where the lunatic is furious, the attorney general may present the petition.¹¹⁷

384. The persons appointed by the court having jurisdiction of the case to execute a commission of lunacy are called *commissioners*. They are required to execute the commission in a proper place, in a proper manner, and to make a proper return to it.

385. It is but reasonable that the commission should be executed in such place that the lunatic may be seen, if required, and where his friends are to be found, who may see that his interests are protected, and where he may himself appear and defend himself.¹¹⁸ Accordingly the common order of the court or chancellor who has jurisdiction of the case directs that the commission of lunacy shall be executed in or near the place of residence of the supposed lunatic.¹¹⁹

386. In obedience to the exigency of the commission, the sheriff is bound to summon the number of jurors therein directed; the commissioners and the jury being impanelled, sit together and compose the court which is to try whether the person alleged to be a lunatic is so or not. The jury are all sworn or affirmed, and then hear such evidence as the commissioners admit. The witnesses must be examined openly in the presence of the commissioners, the jury, the alleged lunatic, and all other persons who may happen to be present.

At least twelve of the jury must agree to find against the alleged lunatic before the inquisition can be found, and where the statutes require but twelve jurors they must be unanimous.

The commission and the verdict must be consistent with each other upon the face of the record; that is, the inquisition must be in the words of the commission or in equivalent words.

387. The *inquisition* is an examination of the facts authorized to be inquired into, made by the commissioners and the jury; the instrument of writing on which their decision is made is also called an inquisition. Its requisites are the following: It must state where it was taken; when it was taken; before whom and by what authority; the names of the jurors, and their qualifications; of what they were charged to inquire; their finding; the date of their finding; the signatures of the commissioners and of the jurors who consent to it.

The finding against a person *non compos mentis* should state the fact positively that he is an idiot,¹²⁰ *non compos mentis*, or of unsound mind.¹²¹ Inquisitions with returns finding persons in the following conditions, namely: "Not sufficient to manage his person and estate;"¹²² "not of sufficient understanding to manage her own affairs;"¹²³ "not a lunatic, but incapable;"¹²⁴ "not a lunatic, yet not proper to take care of his affairs during his fits;"¹²⁵ "weak for the last twenty years;"¹²⁶ "worn out with age, and incapable of managing her own

¹¹⁵ 1 Collinson, Lun. 377; Shelford, Lun. 93; Ex parte Ogle, 15 Ves. Ch. 112.

¹¹⁶ Ex parte Tomlinson, 1 Ves. & B. Ch. Ir. 59.

¹¹⁷ 1 Collinson, Lun. 125; Shelford, Lun. 93.

¹¹⁸ Ex parte Cranmer, 12 Ves. Ch. 445. See 1 Paris & F. Med. Jur. 394, n. (a).

¹¹⁹ Shelford, Lun. 95, 96. ¹²⁰ Prodgers v. Frazier, 3 Mod. 43; 1 Vern. Ch. 16.

¹²¹ Lower Augusta v. Northumberland, 37 Penn. St. 143.

¹²² Ex parte Read, 1 Atk. Ch. 160; 2 Inst. 4051.

¹²³ Ex parte Harvey, 3 Atk. Ch. 169.

¹²⁴ Ex parte Hals, 2 Ves. Sen. Ch. 405.

¹²⁵ Ex parte Ashton, 3 Atk. Ch. 169.

¹²⁶ Hubsey's Case, 3 Atk. Ch. 173.

affairs;"¹²⁷ "by reason of old age and sickness is so deprived of reason as to be unable to manage his estate," have been held not to be a finding of *non compos* within the statute.¹²⁸

When the inquisition is quashed as repugnant or for some other legal cause, the course is to issue a new one by beginning *de novo*,¹²⁹ and not to direct a *melius inquirendum*.¹³⁰

388. The principles of the statute of the 2 and 3 Edw. VI, c. 8, s. 6, which authorize any person who shall feel himself aggrieved by such office or inquisition, to traverse the same, have been generally adopted either by statutes or in practice; so that either the person found to be a lunatic or his friends may claim a trial by jury.¹³¹

389. Upon the return of an inquisition, when there is no traverse, or after the finding of a jury that the party is *non compos mentis*, a lunatic, or of unsound mind, the court appoint a committee to take care of the person and estate of the lunatic, or to take care of the person only or of the estate only.

390. In the selection of the committee of the person of a *non compos*, the next of kin are generally preferred. But the choice is made for the benefit of the lunatic and not of the committee, and for sufficient reasons a stranger will be preferred.¹³²

The committee is required to administer all the comfort and amusement which the nature of the case will admit, and the funds of the lunatic afford; and when the unhappy person is not under the immediate care of the committee, the latter ought to engage suitable persons to watch over him, and, with the aid of a physician, do all they can to restore him to health.¹³³

In the performance of his arduous duties, the court upon application will protect and aid the committee by their advice and direction.¹³⁴

391. The heir-at-law is selected in the appointment of the committee of the estate in preference to others, because he has the greatest inducement to take good care of it,¹³⁵ and a relation will, *ceteris paribus*, be preferred to a stranger.¹³⁶

In the management of the estate, the committee is considered as a mere commissioner of the court, acting under its direction and control, and is responsible to the court as a receiver, removable in its discretion.¹³⁷

The committee is bound to file an account whenever required by the court, and is liable generally as a guardian, and entitled to a just compensation for his services.

392. When a person has been found to be *non compos*, an idiot, a lunatic, or one of unsound mind, he is deprived of the right of making any contract, bringing or defending an action, or indeed of performing any of the various acts required of a man *sui juris*. He does everything by his committee. Actions may be brought by the committee in the name of the lunatic, and actions brought against the latter must be defended by the committee.¹³⁸ The lunatic cannot exercise any civil or political right, and he is incapable of committing any crime.¹³⁹

¹²⁷ Wall's Case, 3 Atk. Ch. 173.

¹²⁸ John Beaumont, 1 Whart. Penn. 52.

¹²⁹ Hals' Case, 2 Ves. Sen. Ch. 305.

¹²⁹ Ex parte Cranmer, 12 Ves. Ch. 154.

¹³¹ Shelford, Lun. 115. In re Runey Dey, 1 Stockt. N. J. 181; See Dowell v. Jacks, 5 Jones, Eq. No. C, 417.

¹³² Shelford, Lun. 138, 139.

¹³³ Shelford, Lun. 142. See, as to his duties, Naylor v. Naylor, 4 Dan. Ky. 346; In the matter of Taylor, 9 Paige, Ch. N. Y. 611.

¹³⁴ In the matter of Lynch, 5 Paige, Ch. N. Y. 120; Matter of Heller, 2 Paige, Ch. N. Y. 199; In the matter of Livingston, 9 Paige, Ch. N. Y. 440.

¹³⁵ 1 Sharswood, Blackst. Comm. 304.

¹³⁶ Ex parte Le Heup, 18 Ves. Ch. 227.

¹³⁷ Bolling v. Turner, 6 Rand. Va. 584.

¹³⁸ Field v. Lucas, 21 Ga. 447; Aldridge v. Montgomery, 9 Ind. 302.

¹³⁹ Stock, Non. Comp. Ment. *passim*.

These disabilities relate to the time that the inquest have found as the commencement of the malady ;¹⁴⁰ and acts before office found are voidable.¹⁴¹

393. On the recovery of the lunatic and his restoration to health, it is unjust to deprive him of his rights, and he may be restored by a proper application to the court. The course is, not to make void from the beginning all the proceedings which have taken place, because that would make all persons who acted under them trespassers. The practice is, to supersede the commission, or annul all future effects.

For this purpose the lunatic presents a petition to the court, which should always be in his own name ;¹⁴² and, upon inspection, the affidavits of respectable physicians, and other evidence to satisfy the court, a supersedeas will be granted.¹⁴³ But this is not a matter of right, for the court may either direct an issue to try the question of sanity, or order a traverse.¹⁴⁴

The effect of the *supersedeas* is, to restore the lunatic to all his civil and political rights, and to entitle him to the return of his property.

¹⁴⁰ *Pearl v. McDowell*, 3 J. J. Marsh. Ky. 658.

¹⁴¹ *Jackson v. Gumaer*, 2 Cow. N. Y. 552.

¹⁴² *Ex parte Bampton*, Mosel. Ch. 78.

¹⁴³ *Ex parte Stanley*, 2 Ves. Sen. Ch. 25.

¹⁴⁴ *Stock*, Non. Comp. Ment. 113.

CHAPTER VI.

MASTER AND APPRENTICE.

- 394. Definition.
- 396-400. Parties.
 - 396. The master.
 - 398. The apprentice.
 - 401. The services to be rendered.
 - 402. Form of the contract.
 - 403. Duration of apprenticeship.
 - 404. Assignment of indenture.
- 405-408. Duties of master.
 - 406. Obligation to teach apprentice.
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 - 408. Duty to protect apprentice.
 - 409. Rights of master.
 - 410. Duties and rights of apprentice.
 - 412. Remedies between master and apprentice.
 - 413. Dissolution of contract.

394. Apprenticeship is a contract entered into between a person who understands some art, trade or business, called the master, and another person, during his or her minority, who is called the apprentice, with the consent of his or her parent or next friend, by which the former undertakes to teach such minor his art, trade or business, and to fulfil such other covenants as may be agreed upon; and the latter agrees to serve the master during a definite period of time, in such art, trade or business. The term during which the apprentice is to serve is also called his apprenticeship.

395. In most of the states of the Union particular acts have been made to regulate the important relation of master and apprentice, and to their provisions recourse must be had to ascertain the local laws.¹ Their principles alone will be here considered.

396. When there is but one master, it is clear he must become a party to the agreement. To be bound by the contract, he must be *sui juris* and capable of entering into engagements generally. One incapable of making a contract cannot therefore take an apprentice, as a married woman or a lunatic.

397. When the contract is made with several masters, they should all join in the indenture, and be bound to fulfil the covenants towards the apprentice. An indenture, under seal, executed by one of two partners in trade, on behalf of the firm, was therefore held to be void.²

398. Although the infant cannot bind himself alone, and the law has wisely provided a shield for him from oppression in the person of his parent or those who represent him, yet it has left him the choice of his future course of life so far as to require his consent to form the important contract of apprenticeship; and, except in cases where the local laws have otherwise provided, as in the

¹ A contract not in conformity to the statute can be avoided only by the apprentice. *Page v. Marsh*, 36 N. H. 305.

² *Taylor's Case*, 1 Browne, Penn. App. 78.

case of binding out apprentices by the guardians or overseers of the poor, he must be a party to the indenture.³

399. To protect the apprentice, the father, when living, and not legally incapable, must join in the indenture;⁴ and if he be dead, the mother, at least in Pennsylvania, stands in his place.⁵ If the infant have a guardian, he may consent in the place of his parents; and if he have none, he may be bound by his next friend, and such next friend need not have been appointed by legal authority.⁶ An indenture executed by a sister was held valid,⁷ but of course the master of the apprentice cannot act as his next friend.⁸

400. When children have no parents, and become a charge upon the public, the overseers of the poor or similar officers may bind them out under the local laws, without their consent;⁹ but they must in general have gained a settlement in the place where they are bound.

401. An apprentice must be bound to learn an art, trade, business or mystery.¹⁰ The intention of the law is to place him in a position in which he may make a livelihood; and that while he works to increase the wealth of his master, he shall gather that stock of knowledge which may be useful to him in after life. A minor must therefore be bound to some useful employment, at which he may in after life make his living.

It has been held that a father may bind his son to serve three years as a sweep;¹¹ and the overseers of the poor have a right to bind a poor child to do any lawful work the master may see fit to employ him in;¹² or a girl to learn the art, trade, and mystery of a housewife.¹³

402. Though a menial servant may engage himself to serve his master by parol or by writing not under seal, yet to bind an apprentice the form of the contract must be an indenture under seal.¹⁴ An agreement, not sealed, signed by the minor, his mother, and step-father, and by the master, by which it was stipulated that the minor should go on a whaling voyage, and do duty

³ *Commonwealth v. Moore*, 1 Ashm. Penn. 123; *Matter of McDowles*, 8 Johns. N. Y. 328; *Ivins v. Norcross*, 2 Penn. 977; *Stringfield v. Hieskell*, 2 Yerg. Tenn. 546. See 1 Mas. C. C. 78; 2 Dall. 199; 1 Ashm. Penn. 267; 7 Mass. 147; *Squire v. Whipple*, 1 Vt. 69; *Musgrove v. Konegay*, 7 Jones, No. C. 71. The minor's consent is not required when he is under fourteen. *Whitmore v. Whitmore*, 43 Me. 458.

⁴ *Commonwealth v. Crommie*, 8 Watts & S. Penn. 339; *Whitmore v. Whitcomb*, 43 Me. 458.

⁵ *Supplee's Case*, 6 Serg. & R. Penn. 340.

⁶ *Commonwealth v. Deacon*, 6 Serg. & R. Penn. 526.

⁷ *Roache's Case*, 1 Ashm. Penn. 27.

⁸ *Commonwealth v. Kennedy*, 1 Serg. & R. Penn. 366.

⁹ *Ramsey v. Ellsworth*, 1 Penn. 445; *Commonwealth v. Jennings*, 1 Browne, Penn. 197; *Curry v. Jenkins*, Hard. Ky. 498.

¹⁰ The usual form of an indenture of apprenticeship is, that the master will teach the apprentice his art, trade or mystery. An art has been defined to be the power of doing something not taught by nature or instinct; or, a collection of certain rules for doing any thing in a set form. *Eunomus*, Dial. 2, p. 74. The arts are divided into mechanical and liberal arts: the former are those which require more bodily than mental labor; they are usually called trades, and those who pursue them are called artisans or mechanics. The liberal arts are those which have for their sole or principal object works of the mind, and those who are engaged in them are called artists. By trade, in its narrow sense, is understood the business of a particular mechanic, as the trade of a carpenter, shoemaker, and the like. *Bacon*, Abr. *Master and Servant*, D. 1. Mystery has nearly the same meaning as trade; it is a word derived from the French *mestier*, now written *métier*, and signifies a trade, art or occupation. 2 Inst. 668; 2 Hawkins, P. C. c. 23, s. 11.

¹¹ *Commonwealth v. Moore*, 1 Browne, Penn. 275.

¹² *Bowes v. Tibbits*, 7 Me. 475.

¹³ *Commonwealth v. Jennings*, 1 Browne, Penn. 197.

¹⁴ *Ex parte Ruggles*, 10 Serg. & R. Penn. 416; *Hall v. Gardner*, 1 Mass. 172; *Dowd v. Davis*, 4 Dev. No. C. 61; *Squire v. Whipple*, 1 Vt. 69; *Peters v. Lord*, 18 Conn. 337.

on board the ship, and that the master should furnish an outfit, was held not to constitute a contract of apprenticeship.¹⁵

403. In general the contract of apprenticeship entered into by a minor cannot extend beyond his minority,¹⁶ but it may be for a less period, according to the agreement of the parties. The general rule is that infants may be bound, the males till the age of twenty-one years, and the females till the age of eighteen. One who is of full age may bind himself apprentice,¹⁷ but he is not liable to the summary remedy given, in cases of apprentices, by the act of assembly of Pennsylvania; the proper remedy against such apprentice is by an action of covenant on the indenture.¹⁸

404. In the selection of a master the parties are always influenced by something of a personal nature; either the master is the friend of the family of the apprentice, or he is remarkable for his good morals, or knowledge of his trade, or for some other consideration of a personal nature which has induced the choice, and the apprentice is committed to his care in consequence of this good opinion, and in the full confidence that he will not only instruct him in his trade or calling, but will also be careful of his health, morals, and safety.

For these reasons, unless there is an express agreement in the indentures, an apprentice cannot be assigned over to another master for his instruction and care, although it be apparent that the new master could and would instruct him to as great advantage as the first.¹⁹ And when there is power given by the indenture to assign, it must be exercised by the persons authorized; where the indenture is to the master, his heirs and assigns, not naming his executors, the latter cannot assign it.²⁰

As the contract requires for its validity the consent of the father or of those who stand in *loco parentis*, it follows that it cannot be changed without their consent; an agreement between the master and apprentice, altering the persons to whom the latter was bound, is invalid, unless ratified by the parent or those standing in *loco parentis*,²¹ but this is perhaps owing to the peculiar wording of the statute of Pennsylvania, where the decisions were made.

Between the master and the assignee the assignment is valid as a covenant for the services of the apprentice, though such assignment may not bind the apprentice, and if the latter serve the new master, there is no failure of the consideration of the assignment.²² If, however, the apprentice continue with his new master, with the consent of all parties and his own, it is a continuation of the apprenticeship.²³

405. The principal duties of the master are: to teach the apprentice; to fulfil all the covenants he had agreed to perform; to protect the apprentice and defend him.

406. The principal object of putting a minor apprentice is to cause him to be taught some useful employment. The master is, therefore, bound to instruct him, *bona fide*, in the knowledge of the art or trade he has undertaken to teach him; but he is not bound to disclose secrets which are peculiar to himself, and

¹⁵ Nickerson v. Easton, 12 Pick. Mass. 110. In Ohio, and perhaps some other states, the agreement need not be sealed. Walker, Intr. 245.

¹⁶ Walker v. Chambers, 5 Harr. Del. 311.

¹⁷ Commonwealth v. St. Germans, 1 Browne, Penn. 24.

¹⁸ Commonwealth v. Sturgeon, 2 Browne, Penn. 205.

¹⁹ Hadnut v. Bullock, 3 Marsh. 300. See Cochran v. Davis, 5 Litt. Ky. 118; Davis v. Cockburn, 8 Mass. 299; Tucker v. Magee, 18 Ala. 99; Futrell v. Vann, 8 Ired. No. C. 402.

²⁰ Commonwealth v. King, 4 Serg. & R. Penn. 109.

²¹ Commonwealth v. Vanlear, 1 Serg. & R. Penn. 248; Commonwealth v. Jones, 3 Serg. & R. Penn. 158.

²² Nickerson v. Howard, 19 Johns. N. Y. 113.

²³ The King v. Stockland, Dougl. 70.

which are his exclusive property, unless by his covenant in the indenture he has agreed to do so, or such agreement may be presumed from the circumstances. He cannot dismiss him on account of his want of aptitude to learn the trade, but having in good faith endeavored to teach him, he will be excused for not making a good workman, if the apprentice is incapable of learning the trade.²⁴

407. Standing in the place of the father, the master is required to watch over the morals of the apprentice; and not only by prudent advice, but by his exemplary conduct, and fulfilling all the duties of a father toward him, encourage him in the path of virtue. He is also bound to keep toward him all his covenants mentioned in the indenture; and as the covenants on the part of the apprentice to serve, and of the master to teach and provide, are independent, if the apprentice by reason of an incurable accident or illness becomes unable to learn, the master must still fulfil his engagement, and he cannot dismiss the apprentice or put an end to the contract by his own authority.²⁵

He cannot abuse his authority, either by bad treatment or by employing his apprentice in menial employments wholly unconnected with the business he has to learn; nor send him out of the state where he lives, unless such removal is provided for in the indenture, or arises from the nature of the contract, as in the case of an apprentice to a seaman.²⁶

He cannot dismiss his apprentice except by application to a competent tribunal, upon whose decree, in a proper case, the indenture may be cancelled.

After the apprenticeship is at an end, he cannot retain the apprentice on the ground that he has not fulfilled his contract, unless specially authorized by statute.

408. The master may justify an assault and battery in the lawful defence of his apprentice. In this respect he has the same right as if he were his son.

409. The master is entitled to the services of the apprentice and to all the profits arising from his lawful labors. In case his apprentice is induced to leave him, or is harbored by a stranger to his prejudice, the master may recover damages against the wrong-doer by action; but in such case the master must prove the defendant knew the condition of the apprentice, for, if he was not aware of that fact, he was not guilty of any offence against the master, and, as every one is presumed to be free, the burden of proving such knowledge will rest upon the master.²⁷ Though the hiring an apprentice without knowing his condition will not render the defendant liable, yet harboring him afterward will subject him to an action, without a demand or refusal.²⁸

The master may enforce all his lawful commands, and for that purpose may correct his apprentice with that moderation which a father would use toward his children. In this he will be fully justified, but any excessive or cruel beating will subject him to the consequences of an unlawful and unjustifiable battery.

410. For all these advantages which the apprentice reaps from the contract of apprenticeship he is, on his part, bound to obey all his master's lawful commands; to take care of his property and promote his interest, and to perform all the covenants he has entered into by the indenture; to use his best endeavors to learn the trade or business he has undertaken to acquire, and work at it diligently for the benefit of his master; to remain in his master's service during all the term for which he has engaged; but from this last general rule must be

²⁴ *Barger v. Caldwell*, 2 Dan. Ky. 131; *Bell v. Herrington*, 3 Jones, No. C. 323.

²⁵ *Powers v. Ware*, 2 Pick. Mass. 451.

²⁶ *Commonwealth v. Edwards*, 6 Binn. Penn. 202; *Commonwealth v. Deacon*, 6 Serg. & B. Penn. 526; *Coffin v. Bassett*, 2 Pick. Mass. 357; *Himes v. Howes*, 13 Metc. Mass. 80.

²⁷ *Stewart v. Simpson*, 1 Wend. N. Y. 376; *Holliday v. Gamble*, 18 Ill. 35.

²⁸ *Ferguson v. Tucker*, 2 Harr. & J. Md. 182.

excepted the case when the apprentice becomes unable to fulfil his engagement on account of the derangement of his health or other infirmity which would render him permanently unable to follow the profession he desires to embrace.

411. The apprentice may justify an assault and battery in the lawful defence of his master.

412. The statutes which regulate the contract of apprenticeship give summary remedies to both the master and apprentice for the violation of the covenants entered into between them. These disputes are in general referred to the sessions of the peace, and the power of these courts extends generally to all cases, even to the dissolution of the contract.

413. This contract may be dissolved in various ways, the principal of which are the following:

By the agreement of the parties; but in this case not only the consent of the apprentice would be necessary, but also that of the father, guardian, or next friend; for as it was required to make the contract, it is but reasonable that the contract should not be dissolved without their assent.

By death of the master or the apprentice. This being a personal contract, it cannot be performed by any other. No one can teach the apprentice but the master selected for that purpose; but his estate is liable for all the other obligations for which he would have been responsible.

When an apprentice is bound to a firm or partnership, and the partnership is dissolved, one partner has as good a right to the services of the apprentice as the other, and as he cannot serve both, he is perhaps not bound to serve either.²⁹

On a complaint to the proper tribunal, and proof of some grave abuse of power, or great neglect in the performance of the covenants in the indenture, the indenture will be cancelled. This power is generally given to the courts by the local laws.

²⁹ *Hiatt v. Gilmer*, 6 Ired. No. C. 450.

SECOND BOOK.

OF THINGS.

CHAPTER I.

NATURE AND KINDS OF THINGS.

- 414. Definitions—General nature of things.
- 418. Things corporeal and incorporeal.
- 421. Things which are the objects of property.
- 422. Things in which property may be had.
- 423–446. Things which cannot be private property.
- 424. Things common.
- 425. Things public.
- 446. Things which belong to municipal corporations.
- 447. Kinds of things established as property.
- 451–461. Origin and nature of personal property.
- 452. Origin and right of property.
- 453. Possession as separated from property.
- 455. Definition of property.
- 456. Analysis of property.
- 461. Division of property into perfect and imperfect.
- 462–486. Personal property.
- 463. Chattels real.
- 465–478. Chattels personal.
- 466. Chattels personal in possession.
- 467–477. Tangible property.
- 468. Absolute property in possession.
- 475. Qualified property.
- 478. Property not tangible.
- 479. Choses in action.
- 482. Time of enjoyment of personal chattels.
- 483. Number of owners.

414. Having considered the rights and duties of persons, which form the subject of the first book, it is proper now, in this second book, to examine, according to our plan, the things to which persons are entitled, leaving for the third, fourth and fifth books the consideration of actions or the remedies for the infractions of the rights to those things or to property.

415. By the word *things* is understood whatever may become the object of a right or of an obligation, whatever may belong to some one, all objects from which a man may receive some benefit, some advantage, or something useful. Even man himself, his actions and his rights, in those states where slavery is admitted, may be considered things, because they may become the object of another's right.

416. Actions, also, which in another point of view are the third object of law, may be classed with things when they are considered as rights belonging

to a man, and making a part of his property, the object of an action being to obtain a thing belonging to us, though not in our possession. Hence a distinction is made between a thing in possession, or a *chose in possession*, and a thing not in possession, or a *chose in action*, for which an action must be brought to get possession.

417. Things and property are not in law synonymous expressions. The first is much more extended and general than the latter; it comprehends every thing which exists, or which may be of some use to man, although he does not possess it, and, as yet, it makes no part of his patrimony. For example, the air, the sea, wild animals, and desert lands, which are possessed by no one, and to which no one has a title, are things, and not property. Property, on the contrary, comprehends whatever we possess or are entitled to, as a house, a horse, a ring, etc., for it is nothing but the possession which we have, or to which we are entitled, which gives to things the character of property. In other words, things are every object which we may possess, and property whatever we possess or are entitled to.

418. The first division of things is in relation to their nature. It is into things corporeal and things incorporeal.

419. *Corporeal things* are those which are visible and tangible, as a house, a field, a horse, a book, a jewel, etc.

420. *Things incorporeal* are those which are not the objects of sensation, but are the creatures of the mind, being rights issuing out a thing corporeal, or concerning or exercisable within the same; as an obligation, a servitude, an easement, or a usufruct.¹ This subject will be considered under another head.

421. Things, considered as to the property which may be had in them, are capable of being possessed by single persons exclusively of all others, or incapable of being so possessed, by the Roman or civil law, then respectively said to be in *patrimonio* or *extra patrimonium*.

422. Things in *patrimonio* are divided into corporeal and incorporeal when considered as to their nature; and the corporeal are again divided into movable or personal, and immovable or real, when considered as to their kinds.

These things are capable of becoming objects of property, and may be transferred from hand to hand, and passed either by descent or by purchase. They are things in commerce, the title to which is guaranteed to their owners by the law.

423. *Things extra patrimonium*, or those in which no private property can be had by individuals, exclusively from the rest of mankind, are: those which are common to all men; those which belong to the public generally; and those which belong to cities or municipal corporations.

424. *Things common* are the heavens, the light, the air, and the sea, which cannot be appropriated by any man or set of men, so as to deprive others of the use of them.² It is evident that no private property can be had in the heavens, the light, the air, and the sea, which belong equally to all men, and are indispensable to their existence. All men have the right to navigate the sea, and to fish there.³

425. *Res publica*, or things public, are those the property of which is in the state, and their use is common to all its members, as navigable rivers, harbors, the sea shore, highways, bridges, and the like.

426. A *river* is a natural collection of waters, arising from springs or fountains, which flow in a bed or canal of considerable width and length, toward the

¹ Domat, Lois Civiles, liv. pré. t. 3, s. 2, § 3; Pothier, Traité des Choses, in princ.

² Domat, Lois Civ. liv. pré. t. 3, s. 1, §§ 5, 6; Inst. 2, 1, 1.

³ Domat, Lois Civ. Dr. Pub. liv. 1, t. 8, s. 2.

sea.⁴ Rivers are public or private. A private river is one which, owing to its shallowness, or in consequence of the obstructions which are in it, cannot commonly be navigated, and belongs to private individuals, but it is still subject to public use when it can be navigated.⁵

The legislature may render a private river navigable by deepening the channel, but this is taking private property for a public use by the right of eminent domain, for which the owner must be compensated.⁶

427. *Public rivers* are those in which the public have an exclusive right; that is, such as cannot be appropriated to private use. They are navigable or not navigable.

428. *Navigable river*, in a technical sense, means a river in which the tide flows. At common law the soil or bed of such a river below high-water mark belonged not to the riparian proprietor, but to the crown, and this rule has been adopted in this country, the state succeeding to the right of the crown.⁷ In some states, however, the riparian proprietors own to low-water mark, subject to the right of the public to navigate or fish.⁸

429. *Public rivers, not navigable*, are those which belong to the people in general as public highways; the soil of these rivers belongs generally to the riparian owner, but the public have the use of the stream, and the authors of nuisances or impediments on them may be punished.⁹ But in some states, as Alabama and Pennsylvania, the bed of the great rivers belongs to the public, and not to the riparian owner.¹⁰ In the interior states all public rivers are generally called navigable.

430. By the ordinance of congress of 1787, art. 4, relating to the north-western territory, it is provided that the navigable waters leading into the Mississippi and the Saint Lawrence, and the carrying places between the same, shall be common highways and for ever free.¹¹ This provision does not deprive the owner of any such river of the right to the bed of the river when he owns both the banks, or his right to the centre of the stream, the dividing line, or *filum aque*, when he owns one side only.¹²

431. When the riparian owner owns to low-water mark in a navigable river, he has the exclusive right to the soil between high and low-water mark for the purpose of erecting wharves or buildings.¹³

432. When insensible additions are made to the land or shore by the washings of the sea or river, such additions are called *alluvion*. In general, the proprietor of the land to which such alluvion attaches is entitled to the addi-

⁴ Reynolds v. McArthur, 2 Pet. 417; Jackson v. Halstead, 5 Cow. N. Y. 216.

⁵ Cates v. Wadlington, 1 M'Cord, So. C. 580.

⁶ Walker v. Board of Public Works, 16 Ohio, 540.

⁷ Pollard v. Hagan, 8 How. 212; People v. Tibbetts, 19 N. Y. 523; State v. Jersey City, 1 Dutch. N. J. 525; Bailey v. Philadelphia R. R. 4 Harr. Del. 389; Home v. Richards, 4 Call, Va. 441.

⁸ Lehigh R. R. v. Trone, 28 Penn. St. 206; Commonwealth v. Alger, 7 Cush. Mass. 53.

⁹ Angell, Wat. Courses, 202; Callis, Sewers, 78; Commonwealth v. Alger, 7 Cush. Mass. 53; Brown v. Chadbourne, 31 Me. 9; Walker v. Board of Public Works, 16 Ohio, 540; Walker v. Shepardson, 4 Wisc. 486; Lorman v. Benson, 8 Mich. 18; Cates v. Wadlington, 1 M'Cord, So. C. 580. It is held that the city of St. Louis owns the soil to the middle of the Mississippi. Jones v. Souard, 24 How. 41.

¹⁰ Carson v. Blazer, 2 Binn. Penn. 475; Shunk v. Schuylkill Co. 14 Serg. & R. Penn. 71; Bullock v. Wilson, 11 Ala. 436; Haight v. Keokuk, 4 Iowa, 199; Commissioners v. Withers, 29 Miss. 21; Flanagan v. Philadelphia, 42 Penn. St. 219; Stuart v. Clark, 2 Swan, Tenn. 9.

¹¹ 3 Story, Laws of U. S. 2077.

¹² Gavitt v. Chambers, 3 Ohio, 496. See Palmer v. Cuyabroga County, 3 McLean, C. C. 227.

¹³ East Haven v. Hemingway, 7 Conn. 186.

tion. The characteristic of alluvion is its imperceptible increase, so that it cannot be seen what is added each moment of time.¹⁴

433. Alluvion differs from *avulsion*. By the latter expression is meant the sudden change made by force of the water by which the soil is taken to a considerable extent and carried from one man's estate to that of another. In such case the property so removed belongs to the first owner.¹⁵

434. When an *island* is formed out of the sea or in a river, by slow and imperceptible accretion, at common law, it belongs, in the case of the sea or a navigable river, to the sovereign, and in case of rivers not navigable, that is, about that point where the sea ebbs and flows, to the owners of the adjoining lands.¹⁶

An island in a river not navigable, which has not been otherwise appropriated, if on one side of the dividing line, belongs to the owner of the bank on that side; if in the middle of the river, the owners of the banks are entitled to it in severalty; in such case, the dividing line runs as if there were no island in the river. When there are several riparian owners, the island is apportioned according to their lines on the main.¹⁷

435. A *harbor* is also public property; it is a place where ships ride with safety, a navigable water protected by the surrounding country; a haven.¹⁸ A road, a creek, a port, an arm of the sea, are also public property, in which no individual can have any private right.

436. A *road* is defined by Lord Hale¹⁹ to be an open passage to the sea, which, from the situation of the adjacent land, and its own depth and wideness, affords a secure place for riding in safety and anchoring vessels.²⁰

437. A *creek* is an inlet from the sea, or a narrow passage from the shore on each side of it, which gives no harbor to ships, and is endowed with no privilege.²¹

438. A *port* is a place within land, protected against the waves and winds, where the water is of a sufficient depth to afford to vessels a place of safety. It is a place to which officers of the customs are appropriated, and which includes the privilege and guidance of all members and creeks which are allotted to it.²²

439. An *arm of the sea* is a place where the sea or tide flows or reflows.²³ This term includes bays, roads, creeks, coves, ports and rivers where the water flows and reflows, whether it be salt or fresh.²⁴

440. The *sea shore* is in general public property, which cannot be exclusively appropriated by individuals. It is defined to be that space of land on the borders of the sea, which is alternately covered and left dry by the rising and falling of the tide; or in other words, that space of land between high and low water.²⁵

¹⁴ See 2 Sharswood, Blackst. Comm. 262, and note by Chitty; 1 Swift. Dig. Conn. 111; Cooper, Just. Inst. l. 2, t. 1; Schultes, Aq. Rights, 116; 2 Am. Law Journ. 282, 293; Inst. 2, l. 20; Dig. 6, l. 23; Dig. 39, 2, 9; Dig. 41, l. 7; New Orleans v. United States, 10 Pet. 662; Deerfield v. Arms, 17 Pick. Mass. 41.

¹⁵ Hargrave, De Jure Maris, 27; Schultes, Aq. Rights, 115-138.

¹⁶ Hale, De Jure Maris, pars 1, c. 6; Bracton, lib. 2, c. 2; Inst. 2, l. 28; Dig. 41, l. 1. In Pennsylvania, it will be remembered the beds of the great rivers belong to the public, although the tide does not ebb and flow there.

¹⁷ Ingraham v. Wilkinson, 4 Pick. Mass. 268.

¹⁸ Hale, De Port. Mar. c. 2; 2 Chitty, Com. Law, 2.

¹⁹ Hale, De Port. Mar. p. 2, c. 2.

²⁰ See 2 Chitty, Com. Law, 4, 5.

²¹ Comyn, Dig. Navigation, C. See 1 Chitty, Com. Law, 726; Postlewaite, Com. Dict.

²² 1 Chitty, Com. Law, 726; Postlewaite, Com. Dict.

²³ Constable's Case, 5 Coke, 107.

²⁴ Angell, Tide Wat. 61.

²⁵ Hargr. St. Tr. 12; Stover v. Freeman, 6 Mass. 435; Commonwealth v. Charlestown, 1 Pick. Mass. 180; Peck v. Lockwood, 5 Day, Conn. 22; Angell, Tide Wat. 34; 3 Kent. Comm. 347. See Coke, Litt. 48, b; Handley's Lessee v. Anthony, 5 Wheat. 374; Scrutton v. Brown, 4, Barnw. & C. 485. The title to the sea shore between high and low-water mark is in each state governed by the same rules as navigable rivers.

According to the Roman law, the sea shore included the land as far as the greatest wave extended in winter; *est autem litus maris, quatenus hibernus fluctus maximus excurrit*.²⁶ The sea shore is said to be public as far as the place where the highest tides rise: *litus publicum est eatenus, quâ maximè fluctus excurrit*.²⁷

441. The general convenience requires that all highways should belong to the public, and that no one should appropriate to his own use such highway to the inconvenience of the people. A *highway* is the generic name for all kinds of roads. They are universally laid out by public authority, and repaired at the public expense, or by direction of law.

442. A *road* or *highway* is a passage through the country, or some parts of it, for the use of the people.²⁸ Roads are public or private.

443. *Public roads* are of two kinds; first, such as are laid out by the government itself and kept in repair out of the public treasury of the nation, the state, a county or other district; and second, those which are made and laid out by authority of law, by a corporation or company of individuals, and which are kept in repair by them.

The public have the use of roads of the first class, but the owners of land over which they pass have a fee in such road, subject to the easement of the public; and the owners of the sides have *primâ facie* a fee in it to the centre of the road, *ad medium filum viæ*, subject of course to the public right; but where the boundary excludes the highway, it is of course excluded.²⁹

The proprietor of the soil of such roads is therefore entitled to all the fruits which grow by its side,³⁰ and to all the mineral wealth they contain.³¹

Whenever such roads are vacated, that is, abandoned by public authority, the easement of the public is gone, and the land, discharged from it, reverts to its former owner.

Turnpikes, railroads, and other ways authorized by the government to be made by corporations, or public companies, are the second class of public roads. These are made and kept in order by the companies to which they respectively belong, but the public have a right to travel over them, and no citizen can be prevented from going on them in such a way as is regulated by law. In general, persons travelling on these roads are required to pay a toll.

These corporations or companies have generally only the right of passage over the land, which remains the property, subject to the easement, of the original owner of the land or his assigns.

444. *Private roads* are such as are used by private individuals only, and are not wanted for the public generally.

445. For the convenience of the public, bridges have to be made in order to go over rivers and other places impassable without them. A *bridge* is a building constructed over a river, creek or other stream, or over a ditch or other place, in order to facilitate the passage over the same. They are of two kinds, public and private.

Public bridges may be divided into, first, those which belong to the public, as state, county or township bridges, over which all the people have a right to pass, with or without paying toll. These are built by public authority at the public expense, either of the state itself, or a district or part of the state.

Second, those which have been built by companies, authorized by the gov-

²⁶ Justinian, Inst. 2, 1, 3.

²⁷ Dig. 50, 16, 112. See La. Civ. Code, Art. 442.

²⁸ *Respublica v. Arnold*, 3 Yeates, Penn. 421.

²⁹ *Peck v. Smith*, 1 Conn. 103; *Chatham v. Brainerd*, 11 Conn. 60; *Tyler v. Hammond*, 11 Pick. Mass. 193. See *Cook v. Green*, 11 Price, Exch. 736; *Headlam v. Headley*, Holt, N. P. 463.

³⁰ *Stackpole v. Healy*, 16 Mass. 33.

³¹ 1 Rolle, Abr. 392, 1, 5.

ernment, over which the people have a right to pass on the payment of a toll fixed by law.

Third, those which have been built by individuals, and which have been dedicated to public uses.³²

A *private bridge* is one built by a private person over his own ground, without any special authority from the government; such a bridge is not considered public, although it may be occasionally used by the public.³³

446. Things which belong to cities or municipal corporations, *res universitatis*, belong so far to the public that they cannot be appropriated to private use. They belong to the corporation or body politic in respect of the property in them; but as to their use they appertain to those persons who are of the corporation, or who happen to be within the same, such as public squares, market houses, streets and the like, which cannot be sold for private use. They differ from things public, because the latter belong to the nation or the state. The lands or other revenue belonging to a municipal corporation do not fall within this class, but are *juris privati*.

447. Things as to their different kinds established by law and considered as property, are divided into things personal, things real and things mixed.

448. Viewed in this light, things are property which is a right a man has in lands and chattels to the exclusion of all others.

449. In its most extensive sense, the word estate is applied to signify everything of which riches or fortune may consist, and includes personal and real property; hence we say personal estate, real estate. And sometimes property is composed of both personal and real, and is then called mixed estate.

450. It is very important that the distinction between personal and real estate should be clearly marked. The manner of acquiring real and personal estate is not the same; nor is the way they are severally enjoyed, and frequently the heirs of the one are not of the other. Sometimes a testator bequeaths his real estate to one person and his personal to another.

Real estate is subject to the dower of the wife and curtesy of the husband. On marriage at common law, the personal estate of the wife in possession passes absolutely to the husband, and the real remains hers, subject to his curtesy.

Things attached to the freehold, as fixtures, are sometimes real and at other times personal; and things which are personal in their nature, as the keys of a house, are considered as real estate in consequence of their destination; other personal things become real, either by their accession or by the use to which they are applied. And things which are real become personal on being separated from the realty, as fruits, coal, etc.

451. To give a clear view of the *origin and nature of personal property*, it will be requisite to inquire into, first, the origin and right of property; second, the possession separated from property; third, what is property and its analysis; fourth, the division of property into perfect and imperfect.

452. Although the rights annexed to property and those which are derived from it are now very extended, such was not the case formerly. Property was confounded with possession, and was lost with it. Before the establishment of the civil state, the right of the first occupant could not be fairly disputed, for when all other things were equal, it was just and natural that the right of the possessor should be preferred, for to deprive him of possession it required a right greater than his own.

Possessed for a great length of time of a field or a tree, and having had the use of it, the idea soon occurred that he who abandoned his possession with an

³² The King v. West Riding of Yorkshire, 2 East, 356; King v. Northampton, 2 Maule & S. 262.

³³ The King v. Bucks, 12 East, 203.

intention of returning, preserved some right of preference over others who had never had such possession, and who would, themselves, in turn lay claim to some other field or some other tree which they also had possessed for a long time. It was by this continued possession that the right not only to the use but to the substance became in the end so fully established in the man who had so long occupied the thing.

This right being once established was soon considered as capable of being transferred to others by the owner; and, at his death, his things being naturally taken possession of by his relatives who attended him on his deathbed, the rights of the latter were, in the course of time, considered as fully established as his own had been.

The municipal or civil law has adopted the maxim that property once acquired is lost only by the act of the owner,³⁴ and that it preserves to the owner his right to it, even after he has lost the possession without his consent, and it is to be found in the hands of a third person; unless, indeed, such third person shall have acquired a right to it by so long a time as to amount to a prescription.

Thus, by the law, property and possession, which, in primitive ages were confounded, became two distinct and independent things—two things which have nothing common between them: property is a right, a legal faculty; possession is a fact.

Property, then, is a moral quality inherent in the thing, which operates as a bond of union between the owner and the thing, and which in general can be severed only by his act.

This right of claiming the thing, wherever he should find it, is what forms the principal and distinctive character of property in the civil state.

453. At the first view, *possession* seems to be a thing clearly understood: according to Blackstone, it is "when a man has not only the right to enjoy, but hath the actual enjoyment of the thing."³⁵ But the subject is full of difficulty. The idea of possession will be different according to the nature of the object, or as it respects things real or things personal. And when we come to consider the persons who possess, it will not be found easy to determine who is in possession. This case has been put:

"A street porter enters an inn, puts down a bundle upon the table and goes out. One person puts his hands upon the bundle to examine it; another puts his to carry it away, saying, It is mine. The innkeeper runs to claim it in opposition to both; the porter returns or does not return. Of these four men, which is in possession of the bundle?"

To ascertain what is possession, we must have a definite idea of it. It is proper to analyze it, and distinguish between physical and legal possession. The former does not suppose any law, it existed before there were laws; it is the detention of the subject, whether a thing or the services of man. The latter is altogether the work of the law; it is the enjoyment of a right over a thing.

In order to complete legal possession two things are requisite; first, that there be an occupancy, apprehension or taking; and secondly, that the taking be with an intent to possess, *animus possidendi*; hence persons having no will, as idiots, cannot acquire a legal possession, which is an assertion of a right.³⁶

³⁴ This requires a qualification, for though true in general it is not so universally; because property may be taken for public use, when the owner, on being compensated, loses his title to it.

³⁵ 2 Sharswood, Blackst. Comm. 389.

³⁶ Etienne, Pothier. See Abbott, Shipp. 9 et seq. and Savigny, Treatise on Possession (or the *jus possessionis* of the Civil Law), a very learned work. See also Bouvier, Law Dict. *Possession*.

454. Possession, separated from property, has preserved several of its ancient prerogatives.

It still remains a means of acquiring property, when it has continued long enough to bar a right of action under the statutes of limitations, or as the civilians say, to operate a prescription.

The possessor has a right to be maintained in his possession, when he is disturbed in it or it is seized from him by violence. The owner himself can regain his possession only by lawful means. But he may regain it by his own act if he can do so peaceably.

The principle that property is acquired by occupation, is preserved by possession and lost with it, is yet applicable to those things which have remained in a state of negative community, such as wild animals, birds, and fishes, and all such things as are naturally found on the sea shore, as precious stones, shells, coral, etc. The rule is different with regard to domestic animals, as will be seen when we come to treat of the qualified rights which men have in things as the subjects of property.

Possession still preserves, in the civil state, the important prerogative of giving the possessor the right, when the title of two contending claimants are otherwise equal.

455. *Property* is the lawful right which a man has in lands or chattels, to dispose of them in the most absolute manner to the exclusion of all others.

456. The right of property subsists independently of the exercise which may be made of it. One is not the less owner, although he may perform no act of ownership, although it may be out of his power to do so, and even when another performs such acts unknown to him or against his will. The right consists in a legal faculty of performing those acts by himself or by another in his name. Property is considered as a quality inherent in the thing.

457. A distinction has been made between property and domain. By the first is understood that quality which we conceive in the thing itself, considered as belonging to such or such person exclusively of all others. By *domain* is understood the right to dispose at our pleasure of what belongs to us, which is considered the effect of property; so that, according to this distinction, domain is attached to the person and property to the thing itself. But this distinction is rather too subtle to be useful in practice; it may in theory throw some light on the nature of the right of property.

This right is what is called *jus in re*, or a right which a man has in a thing by which it belongs to him, a complete and full right.⁷⁷ It is the bond of property which exists between the owner and the thing, independently of any other person; he may follow it into whose possession soever the same may be, whether the possessor has obtained it *bona fide* or otherwise. This right of following the thing which is the object of property wherever it may be found, called *jus in re*, differs from the *jus ad rem*, which is a right a man has, not in the thing, but simply in relation to the thing, against the person who has contracted toward him the obligation of delivering it to him.⁷⁸ It results from an obligation purely personal existing between two or more designated persons, by which one is bound to give or to do something for the other.

The *jus ad rem* is the title or means of acquiring a thing in which we have a property, *jus in re*.

The exercise of the right of property consists in the performance of everything in relation to it not forbidden by law; for what the law does not forbid, it allows. It would be difficult, perhaps useless, to enumerate all the acts

⁷⁷ Pothier, Dr. de Dom. de Prop. n. 1; 1 Sharswood, Blackst. Comm. 312.

⁷⁸ This term is nearly equivalent to *chase in action*. Bouvier, Law Dict. *Jus ad rem*; 2 Woodcasson, Lect. 235; Pothier, Du Dr. de Prop. n. 1.

which a man may do in relation to his property; these may be reduced to three classes which correspond to the three fundamental points of property, namely, enjoyment, exclusion and disposition.

458. The first class, or the right of enjoyment, comprehends the acts which have for their object to procure from the thing which is the subject of property all that is useful or agreeable; in a word, to draw from it all the possible advantages not forbidden by law.

459. The second class, or the right of exclusion, consists in the performance of all those acts which interdict others or prevent them from the use of the thing; to claim the thing and repress all attempts to invalidate the enjoyment or the disposition of the owner.

460. The third class includes all those acts which are relative to the disposition of the thing. To dispose of a thing is to make of it what use we please: the owner has a right to dispose of his property in the most absolute manner. This right includes that of changing the nature of the thing, to change its form, its surface, and even its substance as much as possible; in fact, he may consume it. When it is said the owner has a right to abuse, *jus abutendi*, it must be understood as used in opposition to the right of simple use, *jus utendi*, which is the right of using without destroying the thing. But this right of abuse is not unlimited.³⁹

This right to dispose of a thing includes the power of alienation, in whole or in part, by conveying the title for ever or only for a limited time, purely and without conditions, in favor of one or more persons, gratuitously or for a consideration. To alienate is to transfer one's right of property to another.

This same right includes further that of abandoning the thing and the property, without transferring it to another.

The right of disposing of a thing includes also that of pledging the thing. Indeed, whenever a person binds himself, he binds all his property, and that which he may acquire, for the fulfilment of his obligation; hence the maxim he who binds himself binds his property.

461. Property may be divided into perfect and imperfect. It is perfect when the owner can exercise all the rights of which it is susceptible.

It is imperfect when some of these rights have been separated; for example, a thing pledged belongs to the owner, subject to the pledge.

When the owner transfers his personal property, unless accompanied by possession, he can transfer only the rights he possesses.

462. The phrase *movable property* does not exactly mean *personal property*. By movable property is meant everything which in its nature may be removed, except what is appropriated to real estate by destination, as the keys of a house, and certain fixtures in mills and other buildings; personal property includes not only all movables, but also something more; the whole of which is known by the name of chattels. This term then includes all kinds of property, except the freehold, or things which are parcel of it.⁴⁰

In considering their nature, chattels may be divided into real and personal.

463. *Chattels real* are such as either appertain not to the person immediately, but to something by way of dependency, as a box with the title deeds of lands; or such as are issuing out of some real estate, as a lease of lands, a term of

³⁹ The owner of a horse or other animal has, it is true power over the life of such animal, but he cannot use it in such a cruel manner as will be injurious to the community, either by his example or on account of the cruelty. And for such acts the owner of such property may be punished criminally. 6 City Hall Rec. 62; 3 City Hall Rec. 191. So the owner of a slave cannot put him to death.

⁴⁰ 1 Chitty, Pract. 90, 91; Kendall v. Kendall, 4 Russ. Ch. 360.

years, which pass like personalty to the executor of the owner.⁴¹ The duration of the term of the lease is immaterial, provided it be fixed and determinate, and there be a reversion or remainder in fee in some other person.⁴² It is but personal property, although it may extend to a thousand years, because the time being fixed, it falls below a freehold.⁴³

464. *Heir-looms* are chattels considered as annexed and necessary to the enjoyment of the inheritance. Contrary to the nature of chattels, they descend to the heir, along with the inheritance, and do not pass to the executor of the last proprietor. These are charter deeds and other evidences of the title to the land, together with the box in which they are usually kept, the keys of the house, fish in an artificial pond, pigeons in a pigeon-house, and deer in a park.⁴⁴ These differ from fixtures, which will be considered hereafter.

Heir-looms do not seem to be recognized in this country.

465. *Chattels personal* may be divided into those which are in possession, and those which are in action.

466. Having already considered the nature of possession of personal property and its effects, we will now consider the different kinds of such property, first of tangible personal property, and second of personal property not tangible.

467. *Tangible personalty* in possession includes not only things actually separated and movable, whether animate or inanimate, but also some things which, though annexed to, or proceeding out of real property, are considered in law, for some purposes and under some circumstances removable, and consequently treated as personal property; for example, a tenant's fixtures, removable during the term; growing trees when sold, though not actually severed; and emblements, whether growing corn, roots, or cultivated grass, and growing vegetables.

This tangible personal property in possession may itself be divided into two sorts: an absolute and a qualified property.

468. *Property in possession absolute* is where a man has, solely and exclusively, the right, and also the occupation of any movable chattel, so that it cannot be transferred from him, or cease to be his without his act, consent, or default; unless, indeed, when such property is taken by authority of law for public use.⁴⁵ In such case the owner is to be justly paid or indemnified. This kind of property is either animate or inanimate.

469. *Animals* are distinguished into such as are *domitæ*, of a tame or domestic nature; and such as are *feræ naturæ*, of a wild or savage disposition. In such animals as are tame and domestic, as horses, kine, sheep, poultry, and the like, a man may have an absolute property, as he may have in inanimate things, because they stay continually in his occupation, and will not stray from his house or person, unless by accident or fraudulent enticement, in either of which cases the owner does not lose his property.⁴⁶ Where slavery is established a man has an absolute property in his slave, and if he runs away, the master may retake him, or establish his right by action.⁴⁷

⁴¹ Coke, Litt. 118; 2 Kent, Comm. 342; 8 Viner, Abr. 296; Bacon, Abr. *Baron and Feme* (C 2).

⁴² 1 Sharswood, Blackst. Comm. 386.

⁴³ Coke, Litt. 46 a; Case of Gay, 5 Mass. 419; Brewster v. Hill, 1 N. H. 350; Bacon, Abr. *Legacies*, (B) Bouvier, ed.

⁴⁴ 1 Inst. 3 a; 1 Inst. 185 b.

⁴⁵ 2 Sharswood, Blackst. Comm. 389; Story, Bailm. § 93, g, h, i.

⁴⁶ 2 Sharswood, Blackst. Comm. 390; Dig. 41, 1, 6; 3 Toullier, n. 373; 1 Chitty, Pract. 7, 8.

⁴⁷ Withers v. Smith, 4 Bibb, Ky. 170; Plumpton v. Cook, 2 A. K. Marsh. Ky. 450.

There is a class of animals in which a property of some kind may be had, yet, on account of their inferiority, they are not the subject of larceny; such as dogs,⁴⁸ cats, bears, foxes, monkeys, or ferrets.⁴⁹

The law recognizes no property whatever in rooks.⁵⁰

470. *Inanimate tangible property*, either actually movable, or capable of being removed or separated without great injury to the realty, is generally known by the appropriate and technical name of goods and chattels. This term includes, for some purposes, money, valuable securities, and all other personal property, and even choses in action.⁵¹

471. Growing vegetables or *emblems* are deemed personal property. By emblem is understood the crops growing upon the land; but the word crops, as here used, signifies the products of the earth, which grow yearly and are raised by annual expense and labor, or "great manurance and industry," such as grain; but not fruits which grow on trees, which are not planted yearly, grass and the like, though they are annual.⁵²

472. *Fixtures* are sometimes considered as personal chattels, and, at other times, as part of the realty. Fixtures, technically speaking, are personal chattels annexed to land, and which may afterward be severed and removed by the party who has annexed them, or his personal representatives, with or without the will of the owner of the freehold.

To make a thing a fixture, it must be annexed to the freehold, either actually or by construction. The annexation must be made by joining the chattel to the freehold.⁵³ Once annexed, in general it becomes a part of the realty. But to this rule there are various exceptions: first, when there is a manifest intention to use the fixtures in some employment distinct from that of the occupier of the real estate; and, second, when it has been annexed for the purpose of carrying on trade.⁵⁴ But this distinction between fixtures for trade and those for agriculture does not seem to have been admitted to prevail generally in the United States.⁵⁵ To entitle the tenant to remove them, he must do so within his lease.⁵⁶

473. The right to remove fixtures depends on the situation of the parties who claim them. Persons standing in certain situations can claim them, when they would not be allowed to others. These classes of persons will be separately considered.

When the question, as to the right of removing fixtures, arises between the executor and the heir, the ancient rule that they belong to the real estate, is strict; unless the ancestor has manifested an intention that they should be considered as personal property.⁵⁷

⁴⁸ 4 Sharswood, Blackst. Comm. 236; Findlay v. Bear, 8 Serg. & R. Penn. 571; Comyn, Dig. *Biens*, F; Bacon, Abr. *Trover* (D).

⁴⁹ 1 Chitty, Pract. 88.

⁵⁰ 2 Barnew. & C. 934; 4 Dowl. & R. 518.

⁵¹ 12 Coke, 1; Bacon, Abr. *Legacies* (B), Bouvier, ed.

⁵² Coke, Litt. 55; Comyn, Dig. *Biens*, G.; 10 Barnew. & C. 720; 1 Chitty, Pract. 92, 93; 1 Greenleaf, Ev. § 271; Warwick v. Bruce, 2 Maule & S. 205; Evans v. Roberts, 5 Barnew. & C. 829; Cutler v. Pope, 18 Me. 337; Stewart v. Doughty, 9 Johns. N. Y. 108; Forbes v. Shattuck, 22 Barb. N. Y. 568; Evans v. Inglehart, 6 Gill & J. Md. 188. See beyond Nos. 1582, 1583.

⁵³ Buller, N. P. 34; 3 East, 38; Pothier, Des Choses, § 1.

⁵⁴ 3 East, 88; Lemar v. Miles, 4 Watts, Penn. 330; Vanness v. Pacard, 2 Pet. 137; Swift v. Thompson, 9 Conn. 63; Gale v. Ward, 14 Mass. 352.

⁵⁵ 2 Pet. 137; Whiting v. Brastow, 4 Pick. Mass. 310; Holmes v. Tremper, 20 Johns. N. Y. 29; Smith, Lead. Cas. 5th Am. ed. 240.

⁵⁶ White v. Arndt, 1 Whart. Penn. 91.

⁵⁷ Bacon, Abr. *Executors* (H); House v. House, 10 Paige, Ch. N. Y. 158; Fay v. Mussy, 18 Gray, Mass. 56.

As between the vendor and vendee, the rule is as strict as between the executor and the heir; such fixtures pass to the vendee of the land.⁵⁸

Between the mortgagor and mortgagee, the rule seems to be the same as between the vendor and vendee.⁵⁹

Between the devisee and executor, the former will be considered as a purchaser, and entitled to the fixtures.⁶⁰

Between landlord and the tenant for years, the ancient rule is relaxed, and the right of the tenant to remove fixtures is the most extensive.⁶¹ But this right of removal will depend rather upon the question whether the estate will be left in the same condition in which he took it.⁶²

In cases between tenants for life and their executors and the remainder-men or reversioners, the right to sever fixtures seems to be the same as that of tenant for years.⁶³

In a case between the landlord and the tenant at will, there seems no reason why the same privilege of removing fixtures should not be allowed.⁶⁴

474. Stocks in corporations are in general considered as personal property.⁶⁵

475. By *qualified property* is understood that property which is not perfect in the hands of the possessor, but his right to it is qualified, or limited, or special.⁶⁶

476. A man may have a qualified property in animals *feræ naturæ* on two accounts; first, because he has used his industry in reclaiming them, *per industriam*; and secondly, because such animals are so weak that they cannot go away, *propter impotentiam*.

When animals of a wild nature have been captured by a man, and are confined within his power, he has a qualified property in them:⁶⁷ while so confined they are his own; but as soon as they regain their natural liberty, he loses his right to them.⁶⁸ But the rule is different with wild animals which have been tamed; if they are in the habit of going and returning, the owner retains his property as long as this habit continues;⁶⁹ but if they have gone away a sufficient length of time to raise a presumption that they have lost the habit of returning, the *animus revertendi*, the owner loses his property in them, and they become the property of the first occupant.⁷⁰ Bees, for example, are *feræ naturæ*; but when hived and reclaimed, a man may have a qualified property in them when he hives them,⁷¹ for till that is done he has no more property in bees upon his trees than he has in the birds which happen to alight there.⁷²

⁵⁸ Miller v. Plum, 6 Cow. N. Y. 665; Holmes v. Tremper, 20 Johns. N. Y. 29; Phillipson v. Mallanphy, 1 Miss. 508; Farrar v. Stackpole, 6 Me. 157; Walker v. Sherman, 20 Wend. N. Y. 636; Teaff v. Hewett, 1 Ohio St. 511.

⁵⁹ Amos & F. Fixt. 188; 15 Mass. 159; Winslow v. Merchants' Ins. Co. 4 Metc. Mass. 306; Robert v. Dauphin Bank, 19 Penn. St. 71.

⁶⁰ See Merrington v. Becket, 2 Barnew. & C. 80.

⁶¹ Elwes v. Maw, 3 East, 38.

⁶² Whiting v. Brastow, 4 Pick. Mass. 311.

⁶³ 4 Pick. Mass. 311.

⁶⁴ 4 Pick. Mass. 310.

⁶⁵ 4 Dane, Abr. 670; 1 Chitty, Pract. 96. There are a few exceptional cases where the corporation holding nothing but real estate, the stock has been held to be real estate. Wallis v. Cowles, 2 Conn. 567; Price v. Price, 6 Dan. Ky. 107.

⁶⁶ Story, Bailm. § 93, g, h, i; 2 Sharswood Blackst. Comm. 391; 2 Greenleaf, Ev. § 637.

⁶⁷ But they must be completely within his power, otherwise they may be captured by another. Young v. Hichens, 1 Dav. & M. 592; 6 Q. B. 606; Pierson v. Post, 3 Caines, N. Y. 175; Bacon, Abr. Game; Buster v. Newkirk, 20 Johns. N. Y. 75; Puffendorff, lib. 4, c. 6; Pothier De Propriété, prém. partie, c. 5, s. 1, n. 26.

⁶⁸ Dig. 41, 1, 3 et 5.

⁶⁹ Amory v. Flynn, 10 Johns. N. Y. 102.

⁷⁰ Dig. 41, 1, 6.

⁷¹ Puffendorff, lib. 4, c. 6, § 5; Inst. 2, 1, 14; 8 Toullier, n. 374; 1 Sharswood, Blackst. Comm. 392.

⁷² Wallis v. Mease, 8 Binn. Penn. 546; Inst. 2, 1, 14; Dig. 41, 1, 5, 2; Sed vide Goff v. Kitts, 15 Wend. N. Y. 550; 1 Cow. N. Y. 243.

A qualified property may also be had in animals *feræ naturæ* on account of their weakness, *ratione impotentia*, as the young of birds before they can fly, and the whelps of other animals before they have the ability to go away.⁷³

477. But property may also be of a qualified or special nature, on account of the peculiar circumstances of the owner, when the thing is capable of absolute ownership. A variety of examples of this might be given: a bailee has a qualified property in the thing bailed, and so has the bailor; the pledgor and the pledgee have also such property in the things which are the object of the bailment.

478. In considering personal chattels in possession, we have examined those which were tangible, in which could be had an absolute or qualified property; it will now be proper to take a view of those chattels in possession which are not tangible. These, though in possession as respects the *right*, and consequently not strictly *choses in action*, yet differ from goods, because they are neither tangible nor visible, though the thing produced from the right be perfectly so. In this class may be mentioned *copy rights* and *patent rights*, either in books, music, busts, sculpture, engravings, prints, machines, etc. In these cases the subject-matter of the right is not the book, the music, etc., produced, but the exclusive privilege of continually, for a certain time, printing or making or vending the article.

479. A *chose in action* is the right to receive or recover a debt, or money, or damages, for breach of contract, or for a tort connected with a contract, which cannot be enforced without action, and therefore termed a chose or thing in action.⁷⁴

480. A distinction must be made between the security or the evidence of the debt and the thing due: a deed, a bill of exchange, a promissory note, may be all in possession of the owner, but the money or damages due on them are no less choses in action.

481. There are some differences between personal tangible property in possession, and *choses in action*; the principal of which are: *First*, when money or goods are in possession, or the defendant is entitled to immediate possession, they may be taken in execution; but, in general, a chose in action, at common law, cannot be so taken. In some of the states of the Union the money due on them may be seized by a judgment creditor by a peculiar process authorized by a special statute.⁷⁵ *Second*, the transfer of a chose in action differs from that of a personal chattel in possession, both in form and effect; for though, in general, the beneficial interest of a chose in action may be transferred by parol, and without writing, yet the legal interest does not pass so as to entitle the assignee to sue in his own name; he must use that of the assignor to enforce payment.⁷⁶ But there is an exception to this rule; bills of exchange, and promissory notes, are by the law merchant transferable, and the legal as well as the equitable right passes to the transferee. In some states, by statutory provisions, bonds, mortgages, and other documents may be assigned, and the assignee receives the whole title, both legal and equitable. In order to perfect the transfer, the assignee of a common chose in action must give notice to the debtor, and a neglect to do so will render a payment to the assignor without

⁷³ See 3 Inst. 109; 1 Russell, Cr. 153; 2 Sharswood, Blackst. Comm. 394.

⁷⁴ Comyn, Dig. *Biens*; 1 Chitty, Pract. 99, 140.

⁷⁵ In Pennsylvania, the plaintiff may issue an attachment execution, and seize such property as under a writ of foreign attachment.

⁷⁶ The consequence of this is that the assignee can only recover what the assignor could, and all defences good against the assignor can be used against the assignee. If, however, after the assignment, the debtor expressly promises the assignee to pay him the debt, the assignee can then sue in his own name on the new promise. *Wilson v. Hill*, 10 Metc. Mass. 69; *Thompson v. Emery*, 27 N. H. 269.

notice equally available as if the thing had not been assigned; this is unnecessary when the possession of the thing accompanies the assignment of it. *Third:* A thing tangible and in possession may be the subject of a donation *mortis causa*, when it is delivered; so also bonds, bills, notes may pass by such delivery when so given. But a chose in action, not evidenced by any written security, would not pass as a gift *mortis causa*. *Fourth:* A chose in possession at common law, vests in the husband upon marriage; a chose in action does not vest in him until he obtains possession.

482. Personal property may be limited as to its time of enjoyment. A bequest for life of the thing itself, or of its use only, with a limitation over upon the death of the legatee, will be supported, subject to the same limitation as executory devises of real estate that the property shall not be tied up for more than a life or lives in being and twenty-one years after.⁷⁷

483. A chattel may belong in *severalty* to one person alone, to two or more persons in *joint tenancy*, or in *common*, as well as real estate. By *severalty* is understood the state of property which is held by only one person in his own right, without any other person being joined or connected with him in point of interest during the continuance of his estate.

484. *Joint tenancy* is where two or more persons hold lands, tenements, or chattels by the same title, obtained at the same time, for the same interest, and having the same possession.⁷⁸ Upon the death of one the whole title vests in the survivor or survivors.

485. A *tenancy in common* is one of property held by two or more persons by unity of possession only. Upon the death of one his portion vests in his personal representatives.

486. It is a rule, that when chattels are held in ordinary and common partnerships in trade, upon the death of the joint tenants the right of the deceased vests in his personal representatives, it being a rule that *inter mercatores jus accrescendi locum non habet*,⁷⁹ but the right to recover any debt due to the partnership, or for any past injury, vests in the survivor for the benefit of himself and the representatives of the deceased. If, however, the chattel be held by persons who are not partners, as joint tenants at common law, on the death of one the right of the deceased belongs to the other. But this has been changed by statute in a number of the states of the Union.

⁷⁷ Bacon, Abr. Bouvier ed. *Legacies*, B. 2.; *Patterson v. Ellis* 11 Wend. N. Y. 260.

⁷⁸ *Gilbert v. Richards*, 7 Vt. 203; *Shaw v. Hearsey*, 5 Mass. 521; *Dott v. Wilson*, 1 Bay, So. C. 457.

⁷⁹ Coke, Litt. 3, 282; 1 Mer. Ch. 564; 1 Sharswood, Blackst. Comm. 359.

CHAPTER II.

TITLE BY ORIGINAL ACQUISITION AND BY WAR.

- 487-550. Title by original acquisition.
- 490-507. Title by occupancy.
 - 491. Simple occupancy.
- 499-507. Consequent occupancy or right of accession.
- 500-502. Natural accession.
 - 501. Emblements.
 - 502. Young of animals.
- 503-507. Artificial accession.
 - 504. Adjunction.
 - 505. Specification.
 - 506. Confusion.
- 508-550. Original acquisition by intellectual labor.
- 509-524. Literary property.
- 510-514. Property in unpublished works.
 - 511. Private letters.
 - 512. Dramas.
 - 513. Gift or sale of manuscript.
 - 514. Printed books.
- 515-524. Property in published works.—Copy right.
 - 517. Legislation of the United States.
 - 518. Who is entitled to copy right.
 - 519. For what copy right is granted.
 - 520. Nature of copy right.—Assignment.
 - 521. Duration of copy right.
 - 522. Proceedings to obtain copy right.
 - 523. Requisites after the grant.
- 525-549. Patent rights for inventions.
 - 526. Legislation of the United States.
 - 527. The patentee.
 - 530. For what invention patent is granted.
- 549-542. Proceedings to obtain patent.
 - 534. The caveat.
 - 536. Fees.
 - 537. The petition.
 - 538. The specification.
 - 540. The oath.
 - 541. The examination.
 - 542. Conflicting claims.
- 543-548. The patent.
 - 544. Form of patent.
 - 545. Correction of patent.
 - 546. Disclaimer.
 - 547. Assignment of patent.
 - 548. Duration of patent.
 - 549. After requisites to secure patent right.
- 550. Trade-marks.

- 551-570. Title acquired by war.
 - 551. Booty.
 - 552. Confiscation of individual property.
- 554-570. Prize.
 - 555. Who may make a prize.
 - 559. What may be captured.
 - 562. Where a capture may be made.
 - 563. What is a capture.
 - 564. Postliminy.
 - 565. Ransom.
- 566-570. Adjudication as to prize or no prize.
 - 567. What courts have jurisdiction.
 - 569. Over what subjects jurisdiction extends.
 - 570. Effect of decree of prize court.

487. Property may be acquired in various ways, and we shall first consider the original modes of acquiring personal chattels. The way in which such property is acquired by derivative title will form the next subject.

488. There is an important distinction between the effect of original and that of derived acquisition. When the acquisition is original, the right thus acquired to the thing becomes property, which must be unlimited and unqualified; since no one but the occupant has any right to the thing, he must have the whole right of disposing of it. But with regard to derived acquisition it may be otherwise, for the person from whom the thing is acquired may not have an unlimited right to it, or he may transfer or convey it with certain reservations of right.

489. *Title by original acquisition* is either title by occupancy or title by intellectual labor. These will be considered in order.

490. *Title by occupancy* is either simple or mere occupancy; or consequent occupancy.

491. In the origin of society we have seen that all things belonged to all men by a kind of negative community, so that each could be taken by the first occupant. In the course of time most things were appropriated and became private property, and the right to them became exclusive; but others remain still in the negative community, over which no one has a right, and, until appropriated, they belong to no one. These are subject to the same right of appropriation, and may be seized by the first occupant: *quod nullius est id ratione naturali occupanti conceditur*.¹ No one has a right to that which is *res nullius*, consequently, whoever possesses *rem nullius*, possesses that which no one has a right to take from him. It is therefore his property. In the advanced state of civilization with which we are blessed, this kind of property is not common, but still it may be found.

492. Wild animals, whether they be quadrupeds, birds, or fishes produced in the sea, the heavens or the earth, become the property, by natural law, of whoever takes possession of them. It is the same when the animals or birds are caught on the premises of him who seizes them, or on those of another, but this does not authorize any one to commit a trespass for the purpose of hunting.

When taken, such an animal belongs to the captor; while the animal is living, he has a qualified property, which continues while he remains in the possession of the taker; but if the animal should escape and regain its natural liberty, he loses his right. The animal has regained his natural liberty when he gets out

¹ Justinian, Inst. 2, 1, 12.

of sight, or if in sight, he is under such circumstances that pursuit would be difficult.²

493. Gems, shells, precious stones, found on the sea shore are subject to become the property of the first fortunate finder, because they do not belong to any one.³

494. Things that have been abandoned by the owner belong to the first occupant; but if the owner should repent of having thrown away or abandoned the thing, he may retake it before any one else, and he regains his former title. To entitle the finder to such chattels, the former owner must have wholly abandoned his title; if, as in the case of a wreck, he has parted with the possession on the ground of necessity, or with an evident intention of resuming it, the property has never been abandoned.⁴

495. The acquisition of things tangible by occupancy must be made *corpore et animo*, that is, by an outward act signifying an intention to possess. The necessity of an outward act to commence holding a thing in dominion is founded on the principle that a will or intention cannot have legal effect without an outward act declaring that intention, and, on the other hand, no man can be said to have the dominion over a thing which he has no intention of possessing as his. Therefore a man cannot deprive others of their right to take possession of vacant property by merely considering it as his without actually appropriating it to himself; and if he possesses it without any will of appropriating it to himself, as in the case of an idiot, it cannot be considered as having ceased to be *res nullius*. The outward act or possession need not, however, be manual; for any species of possession, or as the ancients expressed it, *custodia*, is in general a sufficient appropriation.⁵

496. The right of acquiring personal chattels by finding, is limited to those found upon the surface of the earth. It does not extend to goods found derelict at sea, though abandoned without hope of recovery,⁶ nor to goods or money found hidden in the earth, known by the name of treasure trove.⁷ In England such goods belong to the crown; in this country the title to them has perhaps been seldom questioned in the hands of the finder, except by the real owner.

497. No title by occupancy can in this country be gained in waifs, or stolen goods thrown away or scattered by a thief in his flight, in order to effect his escape. In England they belong to the king; here this prerogative has never been adopted by the government against the true owner, and never, perhaps, put in practice against the finder, though against him there would be a better reason for adopting it.⁸

498. Nor can any title be gained by occupancy of estrays, or cattle whose owner is unknown; or of wrecks, or such goods as after a shipwreck are cast upon land by the sea, and left there, within some county, so as not to belong to the jurisdiction of the admiralty, but to the common law.⁹

² Grotius, De Jur. Bell. lib. 2, c. 3, § 5; Dig. 41, 1, 3, 2. The Romans considered things taken in war in the same light; they belonged to the captor until they were retaken or escaped. Dig. 41, 1, 5, 7, 7; Dig. 49, 15, 19, princ.; Inst. 41, 2, 1, 1.

³ Sea weed, when cast upon the shore, belongs to the owner of the adjoining land. 2 Johns. N. Y. 313, 323. See 5 Vt. 223.

⁴ It is now well settled in the case of a wreck derelict at sea, the title still remains in the owner, and the finder is only a salvor, and as such entitled to salvage. The fact of its being derelict merely affects the question of amount of salvage. Two Hundred and Ten Barrels of Oil, 1 Sprague, Dist. Ct. 91; Post v. Jones, 19 How. 161.

⁵ Grotius, 2, 8, 11, note 1.

⁶ 2 Kent, Comm. 357, 4th ed.; The Aquila, 1 C. Rob. Adm. 32; The King v. Property Derelict, 1 Hagg. Adm. 883; Peabody v. Proceeds of 20 bags of cotton, 3 Am. Jur. 119; The Emulous, 1 Sumn. C. C. 207; 1 Ware, Dist. Ct. 41.

⁷ Leqon, Dr. Civ. Rom. § 350-352.

⁸ 2 Kent, Comm. 257, 4th ed.

⁹ 2 Inst. 167; Bracton, 1, 3, c. 3; Mirror, c. 1, s. 13, and c. 3.

The title to lost goods is in most of the states regulated by statute. In the absence of any statute, the title is in the finder, against every one but the owner. The statutes usually provide that after certain prescribed attempts to find the owner and after a certain delay, the title shall vest either in the public or in the finder, or be divided between them.

499. The ownership of a thing, whether real or personal, movable or immovable, carries with it the right to all the thing produces, and to all that becomes united to it, either naturally or artificially; this is called the right of *accession*, a right grounded on that of occupancy.

The doctrine of accession has been adopted from the civil or Roman law, and, contrary to their custom, English lawyers have acknowledged the source, in this instance, from which so many wise rules flowed. It was introduced by Bracton, and the good sense of the doctrine recommended it to the courts, who incorporated it into our system.¹⁰ Accession is natural or artificial.

500. *Natural accession* consists in the right to emblements, and the right to the young of animals.

501. By *emblements* is understood the crops growing in the ground. By crops is here meant the products of the earth which grow yearly and are raised by annual expense and labor, such as grain; but not fruits which grow on trees, not to be yearly planted, grass and the like, though they are annual.¹¹ They belong to the owner of the land, or to the tenant who occupies it, who has sown and planted it. For some purposes emblements are to be considered as personal property, for on the death of the owner, they go to the executor, and not to the heir; but in some respects they are treated as real estate, and, for that reason, at common law they are not the subject of larceny.¹²

502. The owner of a female animal is entitled to all her brood, according to the maxim *partus sequitur ventrem*.¹³

If the animal is hired for a time, the offspring belongs to the hirer who is the temporary owner.¹⁴

503. It is difficult, if not impossible, to reduce to general and precise rules the right of accession, which has for its objects two personal things belonging to two different owners; this right must always be subject to the rules of natural equity.

These rules may be arranged into three classes, which correspond to the three artificial kinds of accessions: adjunction, or the union by adjunction of two things which belong to different owners; specification, or the formation of a new species, with personal chattels belonging to another; and commixtion, or the mixture of several things belonging to several owners.

504. By *adjunction* is meant the union which takes place when the thing belonging to one person is attached or united to that which belongs to another, in such a manner as to form a whole, and yet separable, so that one can subsist without the other; for example, a diamond enchased in a ring; silk thread used to make another man's coat. In these cases, when the adjunction is made by mistake, the whole belongs to the owner of the principal article, upon condition, however, that he shall pay to the other the value of the goods which have been so employed.¹⁵ But the law will not permit one man to gain title in another's chattels, upon the principle of accession, if he took the property willfully as a trespasser.

505. *Specification* is the making a new species out of materials of a different nature; as, cider out of apples; flour out of wheat. When a man

¹⁰ 2 Sharswood, Blackst. Comm. 404.

¹¹ 3 Inst. 109.

¹² Putnam v. Wyley, 8 Johns. N. Y. 432.

¹³ Stevens v. Briggs, 5 Pick. Mass. 177; Pulsifer v. Page, 32 Me. 404.

¹⁴ Coke, Litt. 55 b; Comyn, Dig. *Biens*, G.

¹⁵ Dig. 6, 1, 5, 2; Inst. 2, 1, 19.

takes lawfully the property of another, and changes its nature by making a new species, a question arises to whom does the whole belong? In some cases the substance carries it over the form, in others the form is preferred to the substance.

It seems to be settled that whatever alteration of form any property may have undergone, if taken tortiously, the owner of the original chattel is entitled to it in its new shape.¹⁶

But if the thing changed be taken lawfully, as, when a man believing wood to belong to him, made a table out of it; or money belonging to another which he believed to be his own, and worked it up into a vase, according to the Roman law, he would be the owner of the table or of the vase, but liable to the true owners of the wood or the money for its value.¹⁷ Upon the principle that the writing and the painting in the following cases is the principal, a picture painted on canvas would belong to the painter, he being liable to the owner of the canvas for its value; and the author of a poem or history, written by him by mistake on the paper of another, would belong to the author, he paying for the paper.¹⁸

If the material taken and converted into a new species cannot be changed back to what it was, as if wheat be made into flour, or apples into cider, the new articles belong to the new proprietors, and they become subject to the owners of the materials for their value.¹⁹

506. *Confusion of goods* takes place when the goods of two or more persons become mixed together so that they cannot be separated; as, if the cider of two different persons be poured into the same barrel; when the things put together are capable of separation, the mixture is called *commixtion*; as, if the flock of sheep belonging to A, be mixed with that of B.

In cases of *commixtion* the property in the things is not changed; it may be separated, and the owner of each is entitled to that which belongs to him.²⁰

507. In cases of confusion the rules vary according to the circumstances.

When the confusion takes place by the mutual consent of the owners, they have an interest in the mixture in proportion to their respective shares.²¹

When the confusion arises from inevitable accident, or by the act of a stranger, the rule of the civil law, which deemed the property to be held in common, might be adopted; and it would make no difference whether the mixture produced a thing of the same sort or not; as, if the wine of one were poured into a cask containing the cider of the other, or the gold of one and the silver of another be melted together and made into a vase.²²

When a man mixes his own goods with those of another wilfully, and thereby makes a confusion, the whole of the mass belongs to him whose rights have

¹⁶ Fitzherbert, *Abr. Bar.* 144; *La. Civ. Code*, art. 494, 495; *Church v. Lee*, 5 Johns. N. Y. 848; *Worth v. Northam*, 4 Ired. No. C. 102.

¹⁷ *Inst.* 2, 1, 25, 34; 2 Sharswood, *Blackst. Comm.* 404.

¹⁸ 2 Kent, *Comm.* 362, 363; 3 Toullier, n. 116.

¹⁹ Justinian, *Inst.* 2, 1, 25, 34; *Silbury v. McCoon*, 6 Hill, N. Y. 425. Where the crew of a shipwrecked vessel built a new vessel out of the remnants of the wreck as a means of escape and of saving some of the cargo, it was held that the crew were the owners of the new vessel. *The Holder Borden*, 1 Sprague, Dist. Ct. 144.

²⁰ *Holbrook v. Hyde*, 1 Vt. 286.

²¹ 2 Sharswood, *Blackst. Comm.* 405; 6 Hill, N. Y. 405.

²² The rule in these cases is thus laid down in Justinian's *Institutes*, lib. 2, t. 1, § 27: Si duorum materiæ ex voluntate dominorum confusæ sint, totum id corpus, quod ex confusione fit, utriusque commune est: veluti si qui vina sua confuderint, aut massas argenti vel auri conflaverint. Sed et si diversæ materiæ sint, et ob id propria species facta sit; forte ex vino et melle melum, aut ex auro et argento electrum, idem juris est: nam et hoc casu communem esse speciem non dubitatur. Quodd si fortuito, et non voluntate dominorum, confusæ fuerint, vel ejusdem generis materia, vel diversæ, idem juris esse placuit. See Dane, *Abr. c.* 76, art. 5, § 19.

been invaded, and this rule has been adopted to punish the wrong-doer for his unlawful act.²³

508. An *original title* may be acquired by *intellectual labor*, and under this head we shall consider the rights of an author in his writings called literary property, and of an inventor in his invention.

509. An author has an undoubted right over his unpublished compositions. No man has a right to publish the thoughts of another to the world, or to propagate their publication beyond the points to which he has given consent. But once committed to the public with his consent by printing, he is committed for ever. The questions of the author's right may be considered, first, with regard to the property in his unpublished works, and second, in those which have been published with his consent.²⁴

510. A variety of cases may arise as to the right in the author to restrain the publication of his works; these may be classed into those which relate to private letters, to publication by acting or reciting, to the gift or sale of the manuscript, and to books printed or in the printer's hands.

511. *Private letters* written by one individual to another remain the property of the writer; for some purposes there is a joint property in the right of the writer and the receiver, so that the latter will be restrained from publishing them without the consent of the writer or representatives.²⁵ Their publication will not be restrained, however, when required for the purposes of public justice,²⁶ nor where the author has authorized the publication.

512. Before the year 1856 the copy right laws did not include the acting of *dramas* on the stage. It was accordingly held that acting or reciting was not a publication, and the author did not thereby dedicate his work to the public, and another person could not take notes of the performance and act it himself.²⁷ But the whole matter is now regulated by statute.²⁸

²³ 2 Sharswood, Blackst. Comm. 405; and see 2 Kent, Comm. 365, 4th ed.; Poph. 38, pl. 2; Ward v. Eyre, 2 Bulstr. 323; 15 Ves. Ch. 442; The Odin, 1 C. Rob. Adm. 208; Brackenridge v. Holland, 2 Blackf. Ind. 377; Willard v. Rice, 11 Metc. Mass. 493; Pratt v. Bryant, 20 Vt. 333; Hesselstine v. Stockwell, 30 Me. 237; Inglebright v. Hammond, 19 Ohio 337; Robinson v. Holt, 39 N. H. 557; Beach v. Schmultz, 20 Ill. 185.

²⁴ A distinction is taken between literary property which exists independently of statutes and copy right which is created by statute. Literary property has been defined as the right which entitles an author and his assigns to all the use and profit of his composition, to which no independent right is, through any act or omission on his or their part, vested in another person. It includes more than the right to multiply copies. Keene v. Wheatley, 9 Am. Law Reg. 44, 63.

²⁵ Pope v. Curl, 2 Atk. Ch. 542; Thompson v. Stanhope, Ambl. Ch. 737; Perceval v. Phipps, 2 Ves. & B. Ch. Ir. 13; Gee v. Pritchard, 2 Swanst. Ch. 402; Granard v. Dunkin, 1 Ball & B. Ch. Ir. 207; Dennis v. Leclerk, 1 Mart. La. 297. These cases which restrained the publication of the letters of Pope, Swift and others, seem to rest mainly on the ground that the letters formed a literary composition; and in Wetmore v. Scovell, 3 Edw. Ch. N. Y. 515, an injunction was refused to prevent the publication of private letters of business when they possessed no attribute of literary composition. See also Hoyt v. Mackenzie, 3 Barb. Ch. N. Y. 320. This, however, seems to be too narrow a view. Ordinary business letters seem to be more the property of the receiver than private letters, and there may be cases requiring their public use, and this may have been intended. The true ground seems to be that the writer only confers upon the receiver the right to use the letters for the purpose for which they were manifestly intended at the time. They may be of value as literary compositions; still it is manifest that Pope never sent letters to his friends that they might use them for pecuniary gain. And the publication of private letters is certainly a violation of the confidence and secrecy always implied in such correspondence. The courts will therefore restrain any such unwarranted publication, unless called for by interests more important. Story, Eq. Jur. 944-950; Woolsey v. Judd, 4 Duer, N. Y. 379.

²⁶ Gee v. Pritchard, 2 Swanst. Ch. 427.

²⁷ Coleman v. Wathen, 5 Term. 245; Macklin v. Richardson, Ambl. Ch. 694; Roberts v. Myers, 13 Law Rep. 397.

²⁸ Act of 1856, ch. 169, 11 Stat. 138.

513. When compositions intended for publication or fit for it, by accident or donation, or any other title short of an authority to publish, come into the hands of another person, the possessor has no right to publish them, for the law protects the author in his right of reputation, as well as in his proprietary rights.²⁹

514. A book in a printer's hands although printed, if not published, is still in the power of the author; but the printer may have a lien over the book, though he cannot publish it.

By act of congress it is provided that any person or persons who shall print or publish any manuscript whatever, without the consent of the author or legal proprietor first obtained (if such author or proprietor be a citizen of the United States, or resident therein), shall be liable to suffer and pay to the author or proprietor all damages occasioned by such injury, to be recovered by special action on the case, founded on this act, in any court having cognizance thereof; and the several courts of the United States empowered to grant injunctions to prevent the violation of the rights of authors and inventors, are hereby empowered to grant injunctions, in like manner, according to the principles of equity, to restrain such publication of any manuscript as aforesaid.

515. Before the right of an author was secured to him exclusively by statute, it was questionable when once his book was made public, whether he could prevent the publication of it by others.³⁰ Several statutes were passed in England for this purpose. In the United States the right is secured to authors by certain acts of Congress. It extends to the author of a book, map, chart, or musical composition, print, cut, or engraving, for a limited time. The right thus secured is called a *copyright*.

516. In considering the subject of copy right we will take a view: of the legislation of the United States; of the persons entitled to a copyright; for what it is granted; nature of the right; duration of the right; proceedings to obtain the right; requisites after the grant.

517. The constitution of the United States³¹ authorizes Congress to secure to authors and inventors their respective writings and discoveries. In pursuance of this power several acts were passed which were repealed by the act of February 3, 1831, saving the rights of parties, and by this act and the acts supplementary thereto the subject is now regulated.³²

518. The person must be the author and a citizen of the United States or resident therein, and the legal representatives of such person.³³

²⁹ Duke of Queensberry v. Shebbeare, 4 Burr. 2330; Southey v. Sherwood, 2 Mer. Ch. 435.

³⁰ Millan v. Taylor, 4 Burr. 2303, 2417. This question has never been settled; but it is now well established that the rights of authors after publication are entirely regulated by statute, and the author has no exclusive rights after publication unless he has protected himself in the manner prescribed: Wheaton v. Peters, 8 Pet. 662; Clayton v. Stone, 2 Paine, C. C. 383; Blunt v. Patten, 2 Paine, C. C. 395; Dudley v. Mayhew, 3 N. Y. 12; Stowe v. Thomas, 2 Am. Law Reg. 228; per Grier, J. A publication of the work before copy right is a dedication to the public: Bartlett v. Crittenden, 5 McLean, C. C. 37; Pulte v. Derby, 5 McLean, C. C. 332.

³¹ U. S. Const. art. 1, s. 8.

³² Acts of Congr. Feb. 3, 1831, 4 Stat. 436; June 30, 1834, 4 Stat. 728; Aug. 10, 1846, 9 Stat. 106; Aug. 13, 1856, 11 Stat. 138; Feb. 5, 1859, 11 Stat. 379; Feb. 18, 1861, 12 Stat. 130; March 3, 1865, 13 Stat. 540; Feb. 18, 1867, 14 Stat. 395.

³³ Act of 1831, sec. 1, 8. A "resident" must be a permanent resident, and a temporary residence is not enough, although the author has declared his intention under oath to become a citizen of the United States. Carey v. Collier, 56 Niles, Reg. 262. And although the legal assignee of the author may take out the copy right. Little v. Gould, 2 Blatchf. C. C. 366; this cannot be done where the author is a non-resident alien. Keene v. Wheatley, 9 Am. Law Reg. 45. The "author" entitled to a copy right must actually use intellectual labor in the preparation of the work copy righted. This may be done by compiling material as well as by original composition, but his own brains must enter into the work. It is not enough that he employ another to do the work, furnishing himself the

519. The copy right is granted for any book or books, map, chart, or musical composition which was made or composed, but not printed and published at the time of the passage of the act, or which may have been made or composed afterward, or any print or engraving which the author has invented, designed, etched, engraved, or worked, or caused to be engraved, etched, or worked from his own design.³⁴

It is also granted for photographs.³⁵

520. The persons to whom a copy right has been lawfully granted, have the sole right and liberty of printing, reprinting, publishing, and vending the thing for which the exclusive privilege has been given.³⁶ And if the copy right is granted for any dramatic composition designed or suited for public representation, the author shall have the sole right of acting, performing or representing it, or causing it to be acted, performed or represented, on any stage or public place during the term of the copy right.³⁷ But this must be understood with this qualification. The copy right is granted upon an implied condition that the work is not of an injurious nature; for if it be clearly inconsistent with the principles of public policy, or undoubtedly irreligious, libellous, or of an immoral and obscene description, the right will not be protected in equity or law. *Prima facie*, however, the copy right confers title, and the onus is on the other side to show clearly that notwithstanding the copy right there is an intrinsic defect in the title.³⁸

A copy right may be assigned before its issue, and it will then issue to the assignee. Or it may be assigned after its issue in whole or in part.³⁹ The assignment may include the term of twenty-eight years or this term and the extension. The assignment must be in writing,⁴⁰ and must be proved and acknowledged like deeds of land in the same district, and recorded within sixty days in the office where the original copy right is deposited and recorded.⁴¹

521. The right extends for the term of twenty-eight years from the time of recording the title of the book, etc., in the office of the clerk of the court, as directed by law.⁴² But this right may be extended under certain regulations, for the further term of fourteen years.⁴³

522. The proceedings to obtain a copy right are very simple. The author, or his representative is only required to deposit a printed copy of the title of the book, etc., in the clerk's office of the district court of the district where the author or proprietor may reside. The clerk makes a record of it for the fee of fifty cents, and delivers to the party a copy under seal for the like fee.

523. The person to whom the copy right is granted is required to cause to be inserted in the several copies of each and every edition published, during the term secured, on the title page or on the page immediately following, if it be a book, or if a map, chart, musical composition, print, cut, or engraving, by

general scope of the work and the materials. One who employs an artist to make a picture cannot copy right it. A copy right is *prima facie* evidence that the owner is the author, and upon the whole evidence, the question of authorship is for the jury to decide. *Binns v. Woodruff*, 4 Wash. C. C. 53; *Pierpont v. Fowle*, 2 Woodb. & M. C. C. 46; *Atwill v. Ferrett*, 2 Blatchf. C. C. 46; *De Witt v. Brooks*, MS. Nelson J. 1861; *Reed v. Carusi*, 8 Law Rep. 411.

³⁴ Act of 1831, s. 1.

³⁵ Act of March 3, 1865, s. 1.

³⁶ Act of 1831, s. 1.

³⁷ Act of Aug. 18, 1856. Before this act authors did not have the exclusive right of acting. *Roberts v. Myers*, 13 Law Rep. 397.

³⁸ See *Lawrence v. Smith*, Jac. Ch. 472.

³⁹ *Roberts v. Myers*, 13 Law Rep. 401.

⁴⁰ *Gould v. Banks*, 8 Wend. N. Y. 565.

⁴¹ Act of June 30, 1834. The record is notice to all the world, and an unrecorded assignment is void as to subsequent purchasers without notice. *Little v. Hall*, 18 How. 171; but good between the parties; *Webb v. Powers*, 2 Woodb. & M. C. C. 510.

⁴² Act of 1831, s. 1.

⁴³ Act of 1831, s. 2, 3, 16.

causing to be impressed on the face thereof, or if a volume of maps, charts, music, or engravings, upon the title or frontispiece thereof, the following words, viz.: "Entered according to act of Congress, in the year —, by A B, in the Clerk's Office of the District Court of —," (as the case may be.)

524. The author or proprietor of any such book, etc., shall, within three months from the publication of said book, etc., deliver or cause to be delivered a copy of the same to the clerk of said district, and the clerk shall once a year transmit lists of all the records and all the books received by him to the secretary of the interior, to be preserved in his office.

The author or proprietor must within one month of the date of publication transmit a copy of the book, etc., copy righted to the library of Congress at Washington. If he fails to do this he is liable to a penalty of twenty-five dollars, and it is the duty of the librarian to make a demand in writing, and if it is not delivered within one month after such demand, the right of exclusive publication shall be forfeited.⁴⁴

The proceedings in relation to recording, etc., must be repeated when a copy right is renewed; and a copy of the record published for four weeks in some newspaper;⁴⁵ and a copy of a subsequent edition, if it has additions, must be sent to the library of congress.⁴⁶

525. A man's invention is as much his property as any thing he could acquire in any way whatever, and he may therefore sell it, and in equity he is entitled to all the benefits arising from it. But unless it has been secured to him by law, others may use it and receive all the benefit of his genius and his labor. To prevent this, most governments have given to inventors the exclusive right of making, and vending to others to be used, their inventions. In the United States this right is secured by certain acts of congress. In the examination of this subject we will consider: the legislation of the United States; who may be a patentee; for what invention a patent is granted; the proceedings to obtain a patent; the patent; the duty or tax on patents; the requisites after the patent; duration of the right.

526. The power to regulate the subject of inventions is vested in congress,⁴⁷ and it rests in the sound discretion of the legislature to say when, and for what length of time, and under what circumstances the patents for inventions shall be granted. Congress may, therefore, grant a patent which shall operate retrospectively by securing to the inventor, for the future, the use of his invention, though it was in public use and enjoyed by the community at the time the act was passed.⁴⁸

The first act of the national legislature on the subject of patents was passed on the 10th of April, 1790; several supplements soon followed; the acts of the 7th of February, 1793, of 7th of June, 1794, of 18th of April, 1800, of 3d of July, 1832, and of 13th of July, 1832, were intended to amend the system. But these having created some confusion, and the subject requiring new provisions, the act of 4th of July, 1836, repealed the whole of them, leaving them in force only so far as to save rights acquired under them, and for completing incipient proceedings. This act and those passed since now regulate the subject.⁴⁹

⁴⁴ Act of March 3, 1865, s. 2, 3; Act of February 18, 1867.

⁴⁵ Act of February 3, 1831, s. 2, 3.

⁴⁶ Act of March 3, 1865, sec. 4. As to the violation of copy rights, see beyond, **2316-2320**. As to the remedies for such violation, see beyond, **3785-3789**.

⁴⁷ U. S. Const. Art. 1, s. 8, n. 8.

⁴⁸ *Blanchard v. Sprague*, 3 Sumn. C. C. 525, 2 Stor. C. C. 164.

⁴⁹ Acts of Congress July 4, 1836, 5 Stat. 117; March 3, 1837, 5 Stat. 191; March 3, 1839, 5 Stat. 353; Aug. 29, 1842, 5 Stat. 543; Aug. 6, 1846, 9 Stat. 62; May 27, 1848, 9 Stat. 231; March 3, 1849, 9 Stat. 395; March 3, 1851, 9 Stat. 617; Aug. 30, 1852, 10 Stat. 75; Feb. 18, 1861, 12 Stat. 130; March 2, 1861, 12 Stat. 246; March 3, 1863, 12 Stat. 796; June 25, 1864, 13 Stat. 194; March 3, 1865, 13 Stat. 533; June 27, 1866, 14 Stat. 76.

527. *The patentee* may be any person or persons having discovered or invented the thing to be patented; whether he be a citizen of the United States or an alien, he has a right to a patent on fulfilling the requirements of the law.⁵⁰ Patents for designs are issued to citizens or to aliens who have resided one year in the United States, and taken the oath of intention to become citizens.⁵¹ To entitle a party to a patent he must not only be an inventor, but the original inventor—that is, the first inventor who reduces his invention to practice.⁵²

528. On the death of the inventor before the patent is issued, it shall be granted to the executor or administrator of such person in trust for the heirs at law of the deceased, in case he shall have died intestate; but if otherwise, in trust for his devisees.⁵³

529. If the inventor assigns his right, the patent shall be granted to his assignee, on his recording the assignment⁵⁴ and fulfilling other requirements of the law.

530. A patent will be granted for the invention or discovery of any new and useful art, machine, manufacture or composition of matter, or any new and useful improvement on any art, machine, manufacture or composition of matter not known or used before such discovery or invention, and not, at the time of the application for a patent, in public use or on sale with the consent or allowance of the inventor or discoverer.⁵⁵

The thing to be patented must be an invention or discovery; it must be new and useful.

To make an invention *useful*, it must be one not injurious or mischievous to society and not frivolous or insignificant, but it must benefit the public in some degree, though the degree of utility is immaterial.⁵⁶

The invention or discovery must be something which the inventor has found out; it must be new, but not every new thing can be patented. There must be sufficient novelty to have called for an exercise of the inventive faculty. It makes no difference whether the inventive faculty was actually exercised or whether the invention was the result of accident; but the character of the invention must be such that the inventive faculty may have been exercised. A man cannot patent the application of old materials or machines to new uses analogous to the old uses. The new uses must be different in general character. In many cases the utility of the invention may prove it to be new and the product of invention, for it is concluded that any thing of great utility would not remain undiscovered unless it required intellectual effort to discover it. Upon

⁵⁰ Act of July 4, 1836, s. 6.

⁵¹ Act of March 2, 1861, s. 11.

⁵² *Woodcock v. Parker*, 1 Gall. C. C. 438; *Read v. Cutter*, 1 Stor. C. C. 590.

⁵³ Act of July 4, 1836, s. 10.

⁵⁴ Act of March 3, 1837, s. 6.

⁵⁵ Act of July 4, 1836, s. 6. The term art is used where the patentee has invented a new process of operation, either by the use of original or of old contrivances. It is principally used where there is nothing peculiar in the devices employed, which may be varied indefinitely; but the patentee must show some particular device for carrying out his invention, but his patent includes all modes of carrying out the art. *Hall v. Jarvis*, 1 Webst. Pat. Cas. 100; *Kneass v. Schuylkill Bank*, 4 Wash. C. C. 9; *McClurg v. Kingsland*, 1 How. 204. A patentable machine is a new mechanical device or a new combination of old mechanical devices for the purpose of effecting a result, whether the result be new or old. The process performed by the machine may be the subject of one patent, and the machine of another. *Corning v. Burden*, 15 How. 267. A manufacture is a combination of materials to produce an article of value not a machine. A composition of matter includes medicines and compositions used in the mechanical arts.

⁵⁶ *Lowell v. Lewis*, 1 Mas. C. C. 182; *Langdon v. DeGroot*, 1 Paine C. C. 203; *Curtis*, Pat. § 106.

this ground the substitution of hot air for cold in the blast of furnaces was held to be patentable.⁵⁷

531. The patentee must not only be the inventor—that is, he must actually himself make the invention—but he must also be the first inventor. The patent will be void if it is shown that another in this country invented the subject before the patentee, and it makes no difference whether such other has patented it or not, or whether his invention is known to the patentee or not. But a prior invention in a foreign country will not invalidate the patent unless the subject has been described in a printed publication, or patented in a foreign country more than six months prior to the application here.⁵⁸

There may be a number of original inventors, and the theory of the patent laws is that, as between our own citizens, only the first inventor is entitled to a patent, but an original inventor here shall not lose his right by any knowledge abroad not accessible to the public.

The subject of the patent must not have been known or used by others before the application for a patent.⁵⁹ The inventor may use his invention for any length of time before he applies for a patent, provided he keeps his knowledge to himself. He may allow others to use his invention for not more than two years before he applies for a patent.⁶⁰

532. Besides the ordinary subjects of patents, it is provided that any citizen or alien who has resided one year in the United States, and taken the oath of intention to become a citizen, who invents or produces any new and original design, or a manufacture, whether of metal or other material or materials, and original design for a bust, statue or bas-relief, or composition in alto or basso rilievo, or any new and original impression or ornament, or to be placed on any article of manufacture, the same being formed in marble or other material, or any new and useful pattern, or print or picture to be either worked into or worked on, or printed or painted or cast, or otherwise fixed on any article of manufacture, or any new and original shape or configuration of any article of manufacture, may obtain a patent therefor for the term of three and one half years, or seven years or fourteen years, and the patents may be further extended for seven years.⁶¹ The proceedings and principles in regard to patents for designs are in general the same as for other patents.

533. *The proceedings* to obtain a patent are the caveat, which is an occasional preliminary proceeding, the ordinary proceedings where there is no opposition, and the proceedings in case of conflicting claims.

534. Any citizen of the United States, or alien who shall have resided in the United States one year next preceding, and shall have made oath of his intention to become a citizen thereof, who shall have invented any new art, machine, or improvement thereof, and shall desire further time to mature the same, may, on paying to the credit of the treasury the sum of ten dollars, file in the patent office a *caveat*, setting forth the design and purpose thereof, and its principal and distinguishing characteristics, for the protection of his rights till he shall have matured his invention. The caveat shall be filed in the confidential archives of the office and preserved in secrecy.⁶²

If another person should, within a year from the filing of the caveat, apply for a patent interfering with the rights of the person who has filed his caveat,

⁵⁷ *Crane v. Price*, 1 Webst. Pat. Cas. 393. See as to the novelty required, *Curtis*, Pat. ch. 2; *Phillips*, Pat. 134; *Le Roy v. Tatham*, 14 How. 156, 22 How. 132; *O'Reilly v. Morse*, 15 How. 123.

⁵⁸ Act of July 4, 1836, s. 8, 15; March 3, 1839, s. 6.

⁵⁹ Act of July 4, 1836, s. 6.

⁶⁰ Act of March 3, 1839, s. 7.

⁶¹ Act of Aug. 29, 1842, s. 3; superseded by Act of March 2, 1861, s. 11.

⁶² Act of July 4, 1836, s. 12.

the commissioner of patents is required to give the latter notice by mail, who shall within three months⁶³ after receiving the notice declare whether he will avail himself of the benefit of the caveat. If he does, he is required to file his description, specification, drawings and model. If the claims interfere with each other, they shall be considered as conflicting claims.⁶⁴

535. *The ordinary proceedings*, where there is no opposition, include the fees to be paid, the petition, the description or specification, including drawings, specimens, and models, the oath and the examination.

536. By the act of 1836, aliens were required to pay larger fees than citizens, but by the act of 1861 no discrimination is made against the citizens of foreign countries which do not discriminate against the citizens of the United States. The act of 1861 supersedes the earlier laws fixing the fees, and establishes the rates now in force.⁶⁵ Under this act the fee paid on filing a caveat is not considered as part of the fee on the application, and no money paid for filing an application can be withdrawn.⁶⁶

The fee for issuing a patent must be paid within six months after the application is allowed,⁶⁷ but if this payment is not made, the applicant may make another application within two years from the date of the allowance of the original application.⁶⁸

537. *The petition.* The applicant must make application in writing to the commissioner of patents. This application is usually a petition stating the invention, that the applicant verily believes he is the original and first inventor, and praying that letters patent may be granted.⁶⁹ It must be signed by the inventor if alive, otherwise by his executor.⁷⁰

538. *The specification.* The inventor must deliver a written description of his invention or discovery, and of the manner and process of making, constructing, using and compounding the same, in such full, clear, and exact terms as to enable any person skilled in the art and science to which it appertains to make, construct, compound, and use the same; and in case of any machine he shall fully explain the principle, and the several modes in which he has contemplated the application of that principle or character by which it may be distinguished from other inventions; and shall particularly specify and point out the part, improvement or combination which he claims as his own invention or discovery. Where the nature of the case admits of it he must send drawings, specimens of ingredients, and of the composition of matter, and a model.⁷¹

The specification is annexed to the patent and forms a part of it.

539. The specification has two objects: the first to give the public the full benefit of the discovery after the expiration of the patent, this being the consideration upon which the temporary exclusive right is granted. To accomplish this, the specification must be so written that a reasonably competent workman skilled in the particular art can practice the invention from the

⁶³ This time is computed from the day the notice is mailed at Washington, with the regular time for transmission added. Act of March 2, 1861, s. 9.

⁶⁴ Act of July 4, 1836, s. 12; Act of March 2, 1861, s. 9.

⁶⁵ The rates are: On filing a caveat, ten dollars; application, except for a design, twenty dollars; issuing a patent, twenty dollars; appeal from examiners in chief, twenty dollars; application for reissue, thirty dollars; application for extension, fifty dollars; granting of extension, fifty dollars; disclaimer, ten dollars; copies and recording, according to number of words.

⁶⁶ Act of March 2, 1861, s. 9, 10.

⁶⁷ Act of March 3, 1863, s. 3. This was suspended for six months by act of June 25, 1864.

⁶⁸ Act of March 3, 1865.

⁶⁹ Acts of July 4, 1836, s. 6; March 3, 1837. Forms suitable for the petition are given in the rules issued from time to time by the patent office.

⁷⁰ Act of July 4, 1836, s. 10.

⁷¹ Act of July 4, 1836, s. 6.

specification alone, without the use of any additional knowledge of his own, without using invention and without resorting to experiments.⁷²

The second object of the specification is to inform the public how much the patentee claims as his invention, and to enable persons to use all that is not new, and put them on their guard against infringing the patent. Unless the specification clearly distinguishes between what is new and what is old, the patentee will be understood to claim the whole and the patent will be void.⁷³ The patentee does not claim any thing which he states to be old, but he does necessarily claim everything new, and the distinction between old and new is one way of describing his invention.⁷⁴

Under the patent laws it is held that the inventor cannot patent a "mode of operation," "principle," "idea," or other abstraction of a machine, but must claim the machine itself; and accordingly where the specification describes a practical application, the claim will be held to apply to such application only.⁷⁵ But if the principle is new, the patent covers all practical applications, whether described or not. The patentee must not mislead the public as to what he claims; and it is a sufficient defence to an action for infringement, that the specification "does not contain the whole truth relative to his invention or discovery, or that it contains more than is necessary to produce the described effect; which concealment or addition shall fully appear to have been made for the purpose of deceiving the public."⁷⁶

540. The applicant is required to make *oath* or affirmation that he does verily believe that he is the original and first inventor or discoverer of the art, etc., for which he solicits a patent, and that he does not know or believe the same was ever known or used; and also of what country he is a citizen. The oath may be made in the United States, before any person authorized by law to administer oaths; and, out of the United States, before any minister plenipotentiary, chargé d'affaires, consul or commercial agent, holding a commission under the government of the United States, or before any notary public of the country in which such applicant may be.⁷⁷

541. The commissioner is required to cause an *examination* to be made of the alleged new invention, new discovery, or invention; if this is satisfactory, the application is allowed and a patent ordered to issue. If, however, it appears that the applicant is not the original or first inventor, or that he has claimed too much, the application will not be allowed. The examination is made in the first instance by one of the examiners of the patent office. When the application has been twice rejected by the examiner, the applicant may appeal to the examiners in chief, paying a fee of ten dollars.⁷⁸

From their decision he may appeal to the commissioner of patents. From the decision of the commissioner he may appeal to the chief justice or either of the assistant judges of the circuit court of the district of Columbia.⁷⁹ No fees are repaid when the application is withdrawn or rejected.

542. When it appears that the application interferes with another application, or with an unexpired patent, an *interference* is declared between them, and a trial is had before the commissioner to ascertain who is the first inventor. From the decision appeals may be taken in the same way as in the case of rejected applications treated in the preceding section.

⁷² *Lowell v. Lewis*, 1 Mas. C. C. 182; *Wood v. Underhill*, 5 How. 1.

⁷³ *Moody v. Fiske*, 2 Mas. C. C. 112; *Dixon v. Moyer*, 4 Wash. C. C. 68.

⁷⁴ *Wyeth v. Stone*, 1 Stor. C. C. 273; *Evans v. Eaton*, 3 Wheat. 454.

⁷⁵ *Burr v. Duryea*, 1 Wall. 531; *Blanchard v. Sprague*, 2 Stor. C. C. 164.

⁷⁶ Act of July 4, 1836, s. 15.

⁷⁷ Acts of July 4, 1836, s. 6; Aug. 29, 1842, s. 4.

⁷⁸ Act of March 2, 1861, s. 2, 3; June 27, 1866.

⁷⁹ Act of March 3, 1839, s. 11; Aug. 30, 1852, s. 1.

543. In treating of the *patent* we shall consider its form; how it may be corrected; the disclaimer; the assignment of the patent; the duration and extension of the right.

544. The patent is issued in the name of the United States, under the seal of the patent office, signed by the secretary of the interior,⁸⁰ and countersigned by the commissioner of patents. It contains a short description or title of the invention, and a copy of the specification and drawings is annexed; and in its terms grants to the applicant, his heirs, etc., for a term of seventeen years,⁸¹ the full and exclusive right of making, using, and vending to others to be used, the invention or discovery.⁸²

The patent may date from the time of filing the specification, not exceeding six months prior to the actual issuing of the patent, and cannot be dated more than six months after the application is allowed.⁸³

545. When a patent is inoperative or invalid, by reason of a defective or insufficient description or specification, or because the claim is too broad, if the error arises by mistake without fraud, the patentee may surrender his patent and a new one will be granted, or several new patents will be issued for distinct and separate parts of the invention.⁸⁴

A reissued patent expires at the end of the term of the original patent. If the patentee is dead or has assigned his interest, the patent may be reissued to his executors or assignees. The reissue can only cover the same invention that is described in the original patent.⁸⁵

A reissue is conclusive as to the existence of all the facts which are by law necessary to entitle the commissioner to grant it, and the propriety of the reissue being made cannot be questioned in any court except for fraud.⁸⁶

A patent may be reissued after the expiration of the original term and during its extension.⁸⁷

546. When a patentee through inadvertence, accident or mistake has made his specification or claim too broad, he may *disclaim* such part, and the disclaimer shall thereafter be considered as a part of the original specification. But such a disclaimer shall not affect any action then pending.⁸⁸

547. An invention may be assigned before the patent issues, and the *assignment* being duly recorded, the patent will issue to the assignee.⁸⁹ After issue a patent is assignable in law, either as to the whole interest or any undivided part thereof, by any instrument in writing; which assignment, and also every grant of the exclusive right to the patent within any part of the United States, shall be recorded in the patent office within three months after its execution.⁹⁰ A grant of a right to use the invention not exclusive is a license, and need not be recorded.⁹¹ The provision as to recording is merely directory, and an unrecorded assignment is good against all except *bona fide* purchasers without notice.⁹²

548. All patents granted prior to March 2, 1861, were for the term of fourteen years, and may be extended for seven years more by the commissioner of

⁸⁰ Act of March 3, 1849. Before this act it was signed by the secretary of state.

⁸¹ Act of March 2, 1861, s. 16. Before this act the term was fourteen years.

⁸² Act of July 4, 1836, s. 5.

⁸³ Act of July 4, 1836, s. 8; 1862, s. 3.

⁸⁴ Act of July 4, 1836, s. 13; March 3, 1837, s. 5.

⁸⁵ *Burr v. Duryea*, 1 Wall. 531; *O'Reilly v. Morse*, 15 How. 62; *Battin v. Taggart*, 17 How. 74.

⁸⁶ *Woodworth v. Stone*, 3 Stor. C. C. 749; *Allen v. Blunt*, 3 Stor. C. C. 742.

⁸⁷ *Hartshorn v. Day*, 19 How. 211.

⁸⁸ Act of March 3, 1837, s. 7.

⁸⁹ Act of March 3, 1837, s. 6.

⁹⁰ Act of July 4, 1836, s. 11.

⁹¹ *Brooks v. Byam*, 2 Stor. C. C. 526.

⁹² *Pitts v. Whitman*, 2 Stor. C. C. 609; *Boyd v. McAlpin*, 3 McLean, C. C. 427.

patents.⁹³ All patents issued since March 2, 1861, are for the term of seven-teen years, and cannot be extended.⁹⁴

549. It is the duty of every person who makes or vends a patented article to fix the word "patented," together with the date of the patent, to the article or to the envelope or package; on failure of which he cannot recover damages for infringement unless he proves that the infringer was duly notified of his infringement, and continued to infringe after such notice.⁹⁵

550. *Trade-marks* are a species of property, and any person who has used exclusively a peculiar name, label or other mark is entitled to be protected in this exclusive use.⁹⁶ This property rests upon the reputation which has been gained by the exclusive use, and the use by others is a fraud.⁹⁷

No man can appropriate as a trade-mark a sign or symbol, which from the nature of the case others have an equal right to use, such as the regular name of an article, or an epithet denoting its use or its quality,⁹⁸ unless the user of the mark has the exclusive right to make and sell the article.⁹⁹ But the name of an article is a proper subject of a trade-mark when it denotes the origin, process of manufacture, owner or maker of the article, or is a new and original combination of letters.¹⁰⁰

In many cases the name of the maker of an article constitutes a trade-mark, and the use of this by another is a fraud upon the public. But this can be availed of by the original maker only, for it is clear that a third party, though he may possess an exclusive right to make a particular article, cannot have any exclusive right to use a name which tends to mislead the public.¹⁰¹ The subject is regulated by statute in several of the states.

551. The first class of cases where *things* are *acquired* not by original possession is by the rights of *war*. In regard to these a distinction is to be made between personal property captured on land and on sea. The first is known as booty. The right of booty belongs to the sovereign, who may grant it to individual subjects. It is an undoubted right, and during a war a belligerent may capture the private property of his enemy, and may, if he see fit, give it to the soldiers as pillage or boot. But amongst civilized nations it is customary only to take such property as is needed for warlike operations or the support of the army.

552. It has been doubted whether a belligerent has a right to confiscate the property of individual enemies which is in its country at the commencement of hostilities. In this country it is settled that a belligerent does have such a right, and may confiscate all vessels and cargoes found in our ports at such a time.¹⁰² But this right exists in the government alone, and until authorized by an act of congress cannot be exercised, and the property cannot be judicially

⁹³ Act of July 4, 1836, s. 18; May 27, 1848, s. 1.

⁹⁴ Act of March 2, 1861, sec. 16. A patent may be renewed for any period by special act of congress.

⁹⁵ Act of March 2, 1861, s. 13, repealing Act of 1842, s. 6.

⁹⁶ *Taylor v. Carpenter*, 2 Sandf. Ch. N. Y. 617; *Partridge v. Menck*, How. App. Cas. N. Y. 559; *Amoskeag Mfg. Co. v. Spear*, 2 Sandf. N. Y. 606; *Marsh v. Billings*, 7 Cush. Mass. 322.

⁹⁷ *Coffeen v. Brunton*, 4 McLean, C. C. 517; *Stone v. Carlan*, 3 Bost. Law Rep. 361; *Lemoine v. Ganton*, 2 E. D. Smith N. Y. 347.

⁹⁸ *Amoskeag Mfg. Co. v. Spear*, 2 Sandf. N. Y. 606; *Stokes v. Landgraff*, 17 Barb. N. Y. 609; *Fetridge v. Wells*, 13 How. Pr. N. Y. 387; *Wolfe v. Gourard*, 18 How. Pr. N. Y. 67; *Corwin v. Daly*, Upton, Tr. Marks, 191.

⁹⁹ *Fetridge v. Merchant*, 4 Abb. Pr. N. Y. 158; *Tomlinson v. Battel*, MS. Duer, J. N. Y. 1857.

¹⁰⁰ *Burnett v. Phalon*, 12 Bost. Law Rep. 223; *Davis v. Kendall*, 2 R. I. 569.

¹⁰¹ *Samuel v. Berger*, 24 Barb. N. Y. 163; *Fetridge v. Merchant*, 4 Abb. Pr. N. Y. 157.

¹⁰² *Cargo of The Emulous*, 1 Gal. C. C. 563; *Brown v. United States*, 8 Cranch, 110.

condemned. It is usual at the commencement of hostilities to allow a certain time, after which all private property may be confiscated.

553. The belligerent may also confiscate debts owed by individual enemies to its own citizens at the breaking out of war.¹⁰³ But this right, as well as the right to confiscate property mentioned in the preceding section, is rarely exercised. After booty has been in possession of the enemy for twenty-four hours, or carried into a place of safety, *infra præsidia* of the captor, it becomes absolutely his, without any right of postliminy in favor of the original owner, particularly when it has passed *bona fide* into the hands of a neutral.¹⁰⁴

554. A *prize* is the apprehension and detention at sea, or places within the jurisdiction of the courts of admiralty, of a ship or other vessel, by authority of a belligerent power, either with the design of appropriating it, with the goods and effects it contains, or with that of becoming master of the whole or a part of its cargo.¹⁰⁵ The vessel or goods so taken are also called a prize, and this is the meaning with which the term is generally used.

555. No one has a right to make war but the government duly constituted. This power is vested in congress. It follows of course that no one has authority to make a prize unless he is duly authorized by law. When war has been declared, the public vessels of the United States are employed for this purpose, and their commanders are duly authorized to seize enemy's property on the high seas. Such prizes belong, not to the captors, but to the government. Certain portions are, however, allowed to them in certain cases.¹⁰⁶

556. Individuals, called *privateers*, are also authorized sometimes to arm vessels and to make war upon the enemy's commerce. In this case the privateer receives a commission from the government.¹⁰⁷

The power to issue such commission is vested in the supreme power of every government. In this country the congress has power "to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;"¹⁰⁸ and in 1812 the congress authorized the president to issue commissions to private armed vessels.¹⁰⁹ An attempt was made by the treaty of Paris in 1856 to abolish privateering, but the United States refused to become a party to the treaty unless it was also agreed to exempt all private property from seizure at sea unless it was contraband. And in 1863 the president was authorized to issue letters of marque in such form as he should think proper, and to make all needful rules in regard to them.¹¹⁰

557. Every vessel, whether commissioned or not, has a right to defend itself against attack; when in self-defence its commander captures a hostile vessel, he has a right to take possession and man the prize.¹¹¹

A vessel without a commission, as far as the enemy is concerned, has a right to capture an enemy's vessel; his own country may punish him, but the enemy has no right to treat him as a pirate. And it is believed there is no instance

¹⁰³ *Ware v. Hylton*, 3 Dall. 199.

¹⁰⁴ Wheaton, Int. Law, part 4, c. 2, s. 11; 1 Kent, Comm. 110.

¹⁰⁵ *The Rebekah*, 1 C. Rob. Adm. 227.

¹⁰⁶ *The Dos Hermanos*, 10 Wheat. 306; *The Joseph*, 1 Gall. C. C. 545. In this country the whole proceeds of the prize are given to the captors when the vessel captured is of equal or superior force; in other cases the proceeds are equally divided between the captors and the United States. Act of July 17, 1862, 12 Stat. 600.

¹⁰⁷ *Murray v. Charming Betsey*, 2 Cranch, 64.

¹⁰⁸ U. S. Const. art. 1, s. 8.

¹⁰⁹ Act of June 18, 1812, ch. 102.

¹¹⁰ Act of March 3, 1863, 12 Stat. 758. This act expired in 1866.

¹¹¹ *Haven v. Holland*, 2 Mas. C. C. 230.

in which such irregular captures have been condemned or punished by the country to which the captor belonged.¹¹²

558. If a capture should be made by a non-commissioned captor, it is made for the government; the only claim the captors can sustain is one for salvage.¹¹³

559. In general, all vessels belonging to the enemy may be taken, whether they be public vessels of war, or merchant vessels belonging to individuals; for war is made not only against the government, but against all the individual members of the hostile nation.¹¹⁴

560. But to this general rule there are certain exceptions: 1, when an enemy's vessel has obtained a lawful passport or safe-conduct, which is a privilege granted to the enemy's vessel, exempting it from capture, during a time and to the extent therein prescribed, either from the government or its authorized agent, provided the enemy's vessel has conformed to the conditions of the passport;¹¹⁵ 2, when the enemy's vessel has received a license to trade, it is exempted from capture during the time prescribed, provided it has not violated any of the conditions of the license; 3, when an enemy's vessel carries a flag of truce, or is used as a cartel ship.¹¹⁶

561. Goods of an enemy on board of an enemy's ship are of course liable to seizure as well as the ship. But neutral goods in an enemy's ship are not to be taken as prize.¹¹⁷ It has been the established law until recently that an enemy's goods might be taken in a neutral ship. The parties to the declaration of Paris in 1856 agreed that "the neutral flag covers enemy's goods, with the exception of contraband of war." The United States did not assent to this declaration on account of the article abolishing privateering, but were willing to assent to this article, and acted upon it during the rebellion.¹¹⁸

A neutral vessel is liable to seizure and confiscation as prize when engaged in aiding the enemy by attempting to run a blockade, carrying despatches or officers of the enemy.¹¹⁹

562. A capture may be made on the high seas; it may also be made within the territorial limits of the United States at any place below low-water mark.¹²⁰

A capture cannot be made on the coast of a neutral power and within its territorial limits. In this case the courts of the neutral have jurisdiction to decide whether it is good prize.¹²¹

563. *Capture* is the taking of property by one belligerent from another. It is lawful when made by a declared enemy duly commissioned and according to the laws of war, and unlawful when it is against the rules established by the law of nations.¹²² To make a good capture the ship or vessel must be subdued

¹¹² In 1862, Robert Small, a negro pilot, carried a rebel steamer out of Charleston harbor. The congress directed one half its value to be divided among Small and his associates. Act of May 30, 1862, ch. 87.

¹¹³ The *Dos Hermanos*, 10 Wheat. 306, The *Joseph*, 1 Gall. C. C. 545; The *Amiable Isabella*, 6 Wheat. 1.

¹¹⁴ Wheaton, Int. Law, part 4, c. 2, § 4.

¹¹⁵ Wheaton, Int. Law, part 4, c. 2, § 25; Pothier, Dr. de Prop. part 1, c. 2, s. 2, art. 2, § 2, n. 95.

¹¹⁶ The *Venus*, 4 C. Rob. Adm. 289, Am. ed.; 1 Dods. Adm. 60; Pet. C. C. 106; Dane, Abr. c. 40 a, 6, § 7; Merl. Répert. h. t.

¹¹⁷ The Resolution, 2 Dall. 1; Wheaton, Int. L. § 444.

¹¹⁸ Decl. of Paris, art. 2; Dipl. Corresp. 1861, pp. 143, 251.

¹¹⁹ The case of The Trent in 1862 which threatened to cause a war with England, only decided that where a neutral ship was carrying the officers of the enemy's government, the captor could at most seize the vessel and carry it into port for adjudication; that a seizure of the officers without seizing the vessel was unjustifiable, as it deprived the neutral of the decision of a competent court.

¹²⁰ The *Joseph*, 8 Cranch, 451.

¹²¹ Marshall, Ins. B. 1, c. 12, s. 4.

¹²² The *Estrella*, 4 Wheat. 298.

or taken from the enemy in open war, with intent to deprive the owner of it.¹²³ But if there be submission on one side and possession on the other, the capture is complete, although no prize master be put on board,¹²⁴ or when only a prize master is put on board.¹²⁵

564. *Postliminy, jus postliminii*, is that right in virtue of which persons and things taken by the enemy are restored to their former state when coming again under the power of the nation to which they belong.¹²⁶ But this matter is now regulated by act of congress. It is provided that in case of recaptures of persons or goods belonging to persons resident within, or under the protection of, the United States, the same not having been condemned as prize by competent authority before the recapture, shall be restored on payment of salvage of one eighth of the value if recaptured by a public ship; and if the recaptured vessel shall have been set forth and armed before the recapture, then the salvage to be one moiety of the value. If the captured vessel previously belonged to the government of the United States, and be unarmed, the salvage is one sixth if recaptured by a private vessel, and one twelfth if recaptured by a public ship; if armed, then the salvage to be one moiety if recaptured by a private vessel, and one fourth if recaptured by a public ship. In respect to public armed ships, the cargo pays at the same rate of salvage as the vessel by the express words of the act; but in respect to private vessels, the salvage is the same on the cargo whether the ship be armed or unarmed.¹²⁷

565. *Ransom* is an agreement between the commander of a capturing vessel and the commander of a vanquished vessel at sea, by which the former permits the latter to depart with his vessel, and gives him a safe-conduct, in consideration of a sum of money which the commander of the vanquished vessel in his own name, and in the name of the owners of his vessel and cargo, promises to pay at a future time named to the other. This contract is usually made in writing in duplicate, one copy of which is kept by the vanquished vessel, and is its safe-conduct, and the other by the conquering vessel, and is properly called a *ransom-bill*.¹²⁸

566. After the capture it is the duty of the captor to carry the vessel into a home port for condemnation as prize. The capture alone is sufficient to divest the title of an enemy and to vest it in the captor's government. But many captured vessels belong to neutrals, and their title is not divested until the vessel is condemned by a competent court, nor will the individual captors acquire any title to the prize or its proceeds until it is condemned. Circumstances may excuse the captor from carrying the vessel to a home port, and he may instead carry it to a neutral port, there to await a decree.

567. In the United States the district courts, having admiralty jurisdiction, are alone competent to try the question of prize or no prize.¹²⁹ As to which of the several courts of the United States shall have jurisdiction in a particular case, the rule is, that when the seizure is made within the waters of one district, the court of that district has exclusive jurisdiction, though the offence may have been committed out of the district; when the seizure is made on the high seas, the jurisdiction is in the district where the property may be brought.¹³⁰

¹²³ The *Grotius*, 9 Cranch, 368.

¹²⁴ The *Alexander*, 1 Gall. C. C. 532.

¹²⁵ The *Alexander*, 8 Cranch, 169.

¹²⁶ Vattel, lib. 3, c. 14, s. 204; Chitty, *Law of Nat.* 93 to 104.

¹²⁷ The *Adeline*, 9 Cranch, 244.

¹²⁸ 1 Kent, Comm. 105.

¹²⁹ *Sarportus v. Jennings*, 1 Bay, So. C. 470; *Jenkins v. Putnam*, 1 Bay, So. C. 8; Act of September 24, 1789, s. 9; *Abbott, Shipp.* part 1, c. 1, n. 7; *Hallett v. Lamothe*, 3 Murph. No. C. 279.

¹³⁰ 6 Cranch, 281; The *Abby*, 1 Mas. C. C. 360; The *Little Ann*, Paine, C. C. 40.

568. Foreign courts of admiralty have jurisdiction in prize cases; but the court must be that of one who is a belligerent, for the courts of a neutral have no jurisdiction in such cases.¹³¹ And the courts of an ally have no jurisdiction; the decree must be made by the country of the captor.¹³²

569. The prize court has jurisdiction over all property captured within its district, on the high seas, or in foreign ports, and brought within its jurisdiction. It may also condemn captured property lying in the port of an ally,¹³³ or in a neutral port.¹³⁴

570. The decree of a prize court of competent jurisdiction is binding and conclusive, not only upon the parties actually litigating in the cause, but upon all others, because all who had an interest might have appeared and asserted their rights.¹³⁵ But if the points decided by a foreign prize court are ambiguous, they may be examined.¹³⁶ And, until the admiralty has exercised its jurisdiction, the question of property is open for the application of the principles of the common law.¹³⁷

¹³¹ *Findlay v. William*, 1 Pet. Adm. 12; *The Invincible*, 2 Gall. C. C. 29; *Santissima Trinidad*, 1 Brock. C. C. 478.

¹³² *Wheaton*, Int. Law. § 386.

¹³³ *The Henrick and Maria*, 4 C. Rob. Adm. 43.

¹³⁴ *Hudson v. Guestier*, 4 Cranch, 293; 6 Cranch, 281; *The Arabella*, 2 Gall. C. C. 368.

¹³⁵ *Cherriot v. Poussat*, 3 Binn. Penn. 220; *Sheaf v. 70 hogsheads, Bee*, Adm. 163; *Armroyd v. Williams*, 2 Wash. C. C. 508.

¹³⁶ *Vasse v. Ball*, 2 Yeates, Penn. 178.

¹³⁷ *Jenkins v. Putnam*, 1 Bay, So. C. 8.

CHAPTER III.

CONTRACTS.

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571. The next mode of acquiring a derivative title to property is by contract or by obligations arising from agreements. This is the most important and most frequent way of acquiring title to property. The variety of agreements is very great, their kind is extremely varied, the rules which concern them are very extended, and very different from each other in the several kinds of contracts. There are some rules, however, which apply to all kinds of contracts.

572. Various definitions have been given of the word *contract*, either of which perhaps conveys the true idea of the word. A contract, according to Pothier,¹ is a convention or agreement by which two or more persons consent to form, between themselves, some lawful and binding engagement, or to rescind a preceding one, or to modify it. Blackstone² defines it to be an agreement upon a sufficient consideration to do or not do a particular thing. A contract has also been defined to be a compact between two or more persons.³

Chief Justice Marshall says, "A contract is an agreement in which a party undertakes to do, or not to do, a particular thing."⁴ This seems a complete definition. The consideration does not enter into the definition, for contracts under seal are good without consideration. The requisite that it should be written only applies to certain kinds of contracts.

573. Every contract imposes upon the contractor an obligation to do or to give something according to the law of the land. All obligations derive their force from the law, and therefore every obligation supposes a superior law which binds us to the performance. It is owing to this that the rule has been established that a lawful contract is considered as the law of the parties.

574. The intent of a contract is to form an obligation or engagement. In the engagement which arises from a contract we may distinguish two things very different in themselves, namely:

The obligation of him who makes the promise and who fulfils a duty in executing it.

The right of him who accepts the promise. The right consists in the faculty of enforcing the fulfilment of the promise in a court of justice. Duty and right, then, are correlative, and cannot exist without each other. One cannot be obligated or bound by the contract if another cannot enforce him to accomplish his obligation or engagement.

575. He toward whom the obligation has been contracted is called the obligee or creditor, and he who is bound to fulfil it is the obligor or debtor.

576. Having given some general rules relating to contracts, it will be proper now to examine the conditions essential to their validity. They are: the consent of the party who obligates himself to become bound, and the consent of the party toward whom the obligation is formed to accept it; the capacity of

¹ Pothier, Obl. n. 3.

² 3 Sharswood, Blackst. Comm. 442.

³ Fletcher v. Peck, 6 Cranch 136; see La. Civ. Code, art. 1754; Code Civ. 1101; 1 Powell, Contr. 6.

⁴ Sturgis v. Crowninshield, 4 Wheat. 197.

the parties; a thing which is the object of the agreement; and a lawful consideration for the obligation.

There are some general rules as to the forms of contracts, but they are not always requisite to be observed in order to their validity; form frequently is of little consequence, and substance is every thing. There is a great difference between an agreement in writing, a deed, for example, and the contract which it is intended to secure. The deed may be perfectly formal and good and the contract may be absolutely void; as, where a man's bond is obtained by fraud, the bond may be good, and, on account of duress or fraud, the contract may be void. This distinction must always be kept in view in considering all contracts. And, on the other hand, the agreement may be good and the instrument to secure its performance may be imperfect; as, for example, when a man lends another a sum of money which is to be secured by bond, and it is to be returned in one year, and the paper intended as a bond has not been sealed.

577. *Consent* is an agreement to something proposed by another; it differs from assent, which is an acquiescence in something that has been done.⁵ In a contract two things may be distinguished, the proposition or offer by one of the parties and the acceptance by the other: *duorum in idem placitum consensus*. The contract begins by the offer or proposition, it is completed by the acceptance.

578. The party who makes the offer has a right to recall it until the other has acquired a right to prevent him, and in general this right can be acquired only by acceptance. Although the will of the owner is sufficient to divest him of his right, that alone has not the effect to transfer it to another. It is by the acceptance of the offer that there is a union of minds, an agreement.⁶

If no time is prescribed within which the offer is to be accepted, it will be considered as withdrawn or rejected unless it is accepted within a reasonable time. What is a reasonable time must depend on the circumstances of each case.⁷

But from the moment of the acceptance of an offer, the will of the person who offered, who till then was free to retract his offer, is irrevocably bound by necessity: *contractus sunt ab initio voluntatis, ex post facto necessitatis*.

When the acceptance of an offer is made without condition, the contract is complete;⁸ but when it is made with a condition, in general there is no binding contract. For example, I offer to sell you a thousand bushels of wheat, at a certain price in cash, and you accept my terms, but on condition that I will take a good endorsed note at sixty days, there is no contract between us.⁹

But there are some cases where, although the offer and the acceptance be not the same, yet there is a valid contract: for example, A, a merchant of Philadelphia, writes to B, a merchant in Cincinnati, and offers him four cents per pound for one hundred barrels of pork, and, on the same day, B writes to A, offering to sell him one hundred barrels of pork at three cents and a half per pound, and the letters, which cross each other, are received by the parties, the contract is complete, and A shall pay B three and a half cents per pound, for the greater includes the less.¹⁰

579. The acceptance may be made by a separate paper, as between parties

⁵ Wolffius, Inst. Jur. p. 1. §§ 27, 30; Pardessus, Dr. Comm. n. 138.

⁶ Tucker v. Wood, 12 Johns. N. Y. 190; Bower v. Blessing, 8 Serg. & R. Penn. 243; Craig v. Harper, 3 Cush. Mass. 158; Beckwith v. Cheever, 21 N. H. 41; Smith v. Gowdy, 8 All. Mass. 566.

⁷ Loring v. Boston, 7 Metc. Mass. 409; Averill v. Hedge, 12 Conn. 424.

⁸ Mactier v. Frith, 6 Wend. N. Y. 103.

⁹ Tuttle v. Love, 7 Johns. N. Y. 470; Eliason v. Henshaw, 4 Wheat. 225; Bruce v. Pearson, 3 Johns. N. Y. 534.

¹⁰ Pothier, Vente, n. 26; Brown, Sales, § 223.

who are separated and contract by letter, and questions arise to when the acceptance is complete, whether immediately upon its being made, or whether it must be communicated to the other party. The rule is, that it must be communicated to the party offering.¹¹

The contract is completed from the time the offer is accepted, and not from the time the acceptance is made known to the party making the offer. Thus, if A send an offer by mail to B, who sends back an acceptance by mail, the contract is complete, although A revokes the offer after B has mailed his acceptance, and before A has received it.¹²

580. But the consent to bind the parties need not be express in all cases, it may be implied. It may be manifested by signs, by acts, or even by silence. A nod, a shake of the hands, have always been signs of consent; indeed, there is a contract which, owing to its being consummated in this manner, is called a handsale: *venditio per mutuam manuum complexionem*.¹³ And silence, when a man is bound to speak, gives consent.¹⁴

581. When there is a *mistake*, either as to the person or the thing which is the subject of the contract, it is evident there is no agreement. When the error is respecting the substance of the thing which is the subject of the contract, the agreement is null,¹⁵ but when it falls merely on a quality of that thing, the contract is valid. It is not in general the quality, but the substance of the thing which is the object of the agreement. But there are some qualities which are considered as forming the substance of the thing; as for example, if I sell you a gold watch, both of us believing that the watch shown you is of gold, you are not bound to take the watch if it be only copper gilt over.¹⁶

By the civil law error annuls the agreement, not only when it affects the identity of the subject, but also when it affects that quality of the subject which the parties have principally in contemplation, and which makes the substance of it.¹⁷ It is evident that the case of the gold watch turns on the question whether the buyer buys the particular watch, taking the risks, or buys it as a gold watch. It will in most cases be a question of fact for the jury to say whether the article intended by both parties was delivered.¹⁸

582. By *duress* is meant an actual or threatened violence or restraint of a man's person contrary to law, to compel him to enter into a contract, or to discharge one.

Violence and duress annul the consent; it is evident that there is no consent when physical violence has been used over a person to constrain him to do an act.

The constraint is generally only moral; it acts on the will, which it determines to choose between two evils. A robber meets me on the highway; with a pistol at my breast, he requires my purse or my life. I have the choice of refusing my purse and exposing my life, or *vice versâ*; but still my choice is

¹¹ *Thayer v. Middlesex Ins. Co.*, 10 Pick. Mass. 326; 4 Wheat. 225; *McCullock v. Eagle Ins. Co.*, 1 Pick. Mass. 278; *Slaymaker v. Irwin*, 4 Whart. Penn. 869.

¹² *Taylor v. Merchants' Ins. Co.*, 9 How. 830; *Mactier v. Frith*, 6 Wend. N. Y. 103; *Hutcheson v. Blakeman*, 3 Metc. Ky. 80; *The Palo Alto*, Dav. Dist. Ct. 343; *contra* *McCullock v. Eagle Ins. Co.*, 1 Pick. Mass. 278.

¹³ 2 Sharswood, Blackst. Comm. 448.

¹⁴ *Moore v. Smith*, 14 Serg. & R. Penn. 393; 1 Greenleaf, Ev. §§ 197, 198, 199.

¹⁵ *Hitchcock v. Giddings*, 4 Price, Exch. 135; *Allen v. Hammond*, 11 Pet. 63; *Pothier, Vente*, n. 4.

¹⁶ 1 *Pothier, Obl. n. 18*. See *Williams v. Spafford*, 8 Pick. Mass. 250; *Gardiner v. Gray*, 4 Campb. 144; *Shepherd v. Kain*, 5 Barnew. & Ald. 240; *Chandelor v. Lopus*, Croke, Jac. 4.

¹⁷ 1 *Pothier, Obl. 3d Am. ed.* 113.

¹⁸ See *Merriam v. Wolcott*, 3 All. Mass. 258; *Gardner v. Lane*, 9 All. Mass. 492; *Alexander v. Owen*, 1 Term, 225.

not free, for, left free, I would choose neither alternative. The constraint was therefore absolute.

583. The duress may be in several ways, by imprisonment, *per minas*, or perhaps even duress of goods.

Duress by imprisonment is where a man actually loses his liberty; when the imprisonment is unlawful, it is evident that the constraint is such that it will avoid the contract.¹⁹ But if a man be lawfully imprisoned, it is no reason for avoiding a contract in other respects fair, although the prisoner may enter into it to obtain his liberty.²⁰ But a contract will be avoided for duress if the party is arrested on a process regular and legal in form, but sued out maliciously and without probable cause.²¹

Duress *per minas* is a well-grounded fear of loss of life, or mayhem, or loss of limb, or imprisonment.²² It seems that threats of assault or to destroy property do not amount to duress,²³ but the tendency of the courts is towards the ruling that such threats do avoid a contract.²⁴

In South Carolina duress of goods, under circumstances of great difficulty, will avoid the contract;²⁵ but this may be doubted. But if one pay money to recover his goods, unlawfully detained, he may recover it back.²⁶

584. The duress that will avoid a contract must be practiced upon the party contracting, and if two make a contract, one being under duress, the contract is good against the other.²⁷

Husband and wife being one, duress upon one will avoid the contract of the other,²⁸ and the contract will be avoided although it is not for the benefit of the party practicing the duress.²⁹

585. *Fraud* is any trick or artifice employed by one person to induce another to fall into an error, or to detain him in it, so that he may make an agreement contrary to his interest or prevent him from making one favorable to himself.

Fraud is a ground for annulling an agreement, and it has much analogy with the preceding, particularly with error or mistake. Violence produces fear, which destroys consent for want of freedom; fraud induces error, which prevents consent from the beginning; for there can be no valid consent when it has been given by mistake or surprised by fraud. If an error annuls an agreement, much more must fraud have that effect. There then exists a double motive for doing so: the error which induced the appearance of a consent when it never existed; and the principle of justice which requires every one to repair the damage he has caused to another by his act, and which deprives him of the right to accept of a promise extorted by his artifices.

The test of fraud is an intention to deceive.³⁰

Intentional falsehoods are regarded as fraudulent when they induce the other party to do something by which his interests are injuriously affected. But in our law the maxim of the civil law prevails, *simplex commendatio non obligat*,

¹⁹ *Stouffer v. Latshaw*, 2 Watts, Penn. 167; *Tilley v. Damon*, 11 Cush. Mass. 247.

²⁰ *Shepherd v. Watrous*, 3 Caines, N. Y. 166; *Watkins v. Baird*, 6 Mass. 506.

²¹ *Richardson v. Duncan*, 3 N. H. 508; *Severance v. Kimball*, 8 N. H. 386; *Hackett v. King*, 6 All. Mass. 58.

²² 1 Blackstone, Comm. 131; 2 Inst. 438; 2 Rolle, Abr. 125; Bacon, Abr. *Duress*, *Murder* A.; *Foss v. Hildreth*, 10 All. Mass. 76.

²³ *Maisonnaire v. Keating*, 2 Gall. C. C. 337.

²⁴ See 2 Starkie, Ev. 4th Am. ed. 482; Chitty, Contr. 10th Am. ed. 219; *Foshay v. Ferguson*, 5 Hill, N. Y. 158.

²⁵ *Sarpotus v. Jennings*, 1 Bay, So. C. 470; *Collins v. Westbury*, 2 Bay, So. C. 211.

²⁶ *Elliott v. Swartwout*, 10 Pet. 137; *Cobb v. Charter*, 32 Conn. 358.

²⁷ *Robinson v. Gould*, 11 Cush. Mass. 55; *McClintick v. Cummins*, 3 McLean, C. C. 158.

²⁸ *Eadie v. Slimmon*, 26 N. Y. 9. ²⁹ Pand. lib. iv. tit. 2. *Sheppard, Touchst.* 61.

³⁰ For the cases in which equity will relieve on account of fraud, see No. 3838, et seq.

and it is not fraudulent for the seller to use ordinary language of recommendation of his goods, for the buyer ought not to rely implicitly on this.³¹

Fraud may be either *suggestio falsi* or *suppressio veri*. But all concealment is not necessarily fraudulent, and neither party is obliged to disclose to the other facts which both have an equal opportunity of discovering.³²

586. Fraud is also divided into actual or positive fraud and constructive fraud.

A *positive* fraud is the intentional and successful employment of any cunning, deception, or artifice to circumvent, cheat, and deceive another.³³

Constructive fraud arises from a contract or act, which, though not originating in evil design and contrivance to perpetuate a positive fraud or injury upon other persons, yet has a necessary tendency to deceive and mislead, or to violate public or private confidence, or to impair or injure public interests, and is deemed equally reprehensible with positive fraud, and therefore is prohibited by law as within the same reason and mischief as contracts and acts done *malò animo*.³⁴

587. Having considered what kind of consent is required in order to make a binding contract, it seems proper to inquire next into the *capacity* of the contracting parties.

To be enabled to contract, the party must be of sound mind, in a state to give his consent with discernment, freedom, and reflection.

All persons generally can be parties to contracts, unless they labor under some disability and are declared incapable by law.

Some incapacities arise from nature, as in cases of infancy, idiocy, lunacy, or a want of understanding. The law merely gives certain rules to determine and apply them. Other incapacities are created by law, and do not arise from nature; such are the incapacities of married women, of trustees with regard to buying trust property. This subject is naturally divided into three classes of cases: where the parties want understanding; where they have understanding, but in law are considered as wanting freedom to exercise their will; where they are forbidden to contract because of some rule of policy of the law.

588. The contracts of *idiots* and *lunatics* are not binding, because they are unable from mental infirmity to form an accurate judgment of their actions, and consequently can give no serious consideration to their engagements.³⁵

Contracts made with lunatics, after they have been so found by inquisition upon proceedings before a competent tribunal, are absolutely void.³⁶ As to contracts made anterior to such finding, which generally states the time when the lunacy commenced, they are presumed to be valid; ³⁷ they are not void, but voidable.³⁸

But the contract of a man of weak mind is binding on him, when no advantage has been taken of him, and there has been no fraud in the transaction.³⁹

³¹ Page v. Parker, 43 N. H. 368; Veasey v. Doton, 3 All. Mass. 380; Hemmer v. Cooper, 8 All Mass. 334; Phipps v. Buckman, 30 Penn. St. 401.

³² Laidlaw v. Organ, 2 Wheat. 178; 1 Story, Eq. Jur. §§ 204-208; Harris v. Tyson, 24 Penn. St. 347.

³³ 1 Story, Eq. Jur. § 186; Dig. 4, 3, 1, 2; Dig. 2, 14, 7, 9.

³⁴ 1 Story, Eq. Jur. §§ 258-410.

³⁵ Newland, Contr. 19; 1 Fonblanque, Eq. 46, 47; Highmore, Lun. 111; Webster v. Woodford, 3 Day, Conn. 90; Rice v. Peet, 15 Johns. N. Y. 503; Mitchell v. Kingman, 5 Pick. Mass. 431.

³⁶ Pearl v. McDowell, 3 J. J. Marsh. Ky. 658.

³⁷ Lee v. Lee, 4 M'Cord, So. C. 183; Jackson v. King, 4 Cow. N. Y. 207.

³⁸ Jackson v. Gremaer, 2 Cow. N. Y. 552; see Hutchinson v. Sandt, 4 Rawle, Penn. 231.

³⁹ Dods v. Wilson, Const. So. C. 448.

A lunatic may purchase necessities suitable to his condition, and will be obliged to pay for them.⁴⁰

Contracts made during a lucid interval are valid, and a lunatic may, of course, after he becomes sane, ratify a contract made while insane.

589. A contract made by a party in a complete state of inebriation will be set aside, as he has no agreeing mind.⁴¹

590. In general the contract of an *infant*, however fair and conducive to his interest it may be, is not binding on him, unless the supply of necessities to him be the object of the agreement,⁴² or the contract be for his benefit, and authorized either by statute or some rule of law, as in the case where an infant binds himself apprentice,⁴³ or unless it is confirmed by him after he has attained his full age, and in that case the contract is no longer the contract of an infant.⁴⁴ But he may take advantage of contracts made with him, although the consideration were merely his own promise, as in the case of mutual promises to marry.⁴⁵

When a contract entered into by an infant has been executed, and on coming of age he rescinds it, he must restore the consideration he has received.⁴⁶

591. To the general rule that an infant cannot enter into a contract, are the following exceptions:

When an infant is authorized to enter into the contract by a statute, as, where he is authorized to enlist, the contract is binding;⁴⁷ or he may be bound to a trade.

He may enter into matrimony when arrived at the age of discretion, and before majority; which in the male is above fourteen years, and in the female over twelve years.⁴⁸

⁴⁰ *Bagster v. Earl Portsmouth*, 7 Dowl. & R. 614; *Kendall v. May*, 10 All. Mass. 59.

⁴¹ *King's Ex'rs. v. Bryant's Ex'rs.* 2 Hayw. No. C. 394; 2 Kent, Comm. 11th ed. 584.

⁴² *Newland, Contm* 2; 1 Eq. Cas. Abr. 286. ⁴³ *Rex v. Wigston*, 3 Barnew. & C. 484.

⁴⁴ *Bacon, Abr. Infancy*, I. 3.

⁴⁵ *Buller*, N. P. 155; *Wheaton v. East*, 5 Yerg. Tenn. 41; see *Whitney v. Dutch*, 14 Mass. 457; *Cannon v. Alsbury*, 1 A. K. Marsh. Ky. 76; *Willard v. Stone*, 7 Cow. N. Y. 22.

The rule that infants may take advantage of contracts made by them rests on the principle that such contracts are voidable only, and not absolutely void. And they may be avoided only by the infant; the other party cannot take advantage of the fact of infancy. *United States v. Bainbridge*, 1 Mas. C. C. 71; *Hartness v. Thompson*, 5 Johns. N. Y. 160. And a third person, not a party to the contract, cannot take advantage of the infancy of one of the parties; *Hardy v. Waters*, 38 Me. 450; *Frazier v. Massey*, 14 Ind. 382.

But if the contract is of such a nature that it cannot possibly be for the advantage of the infant, it is entirely void; as where the infant becomes surety on a bond. *Zouch v. Parsons*, 3 Burr. 1794; *McCarty v. Murray*, 3 Gray, Mass. 578; *McCrillis v. How*, 3 N. H. 348. The tendency of modern decisions is to consider contracts of infants as voidable only and not void, and very few cases occur where the contract could not be ratified by the infant.

⁴⁶ *Keriton v. Elliott*, 2 Bulstr. 69; 2 Ed. Ch. 72; *Harvey v. Owen*, 4 Blackf. Ind. 240. It is true that in many cases the infant on avoiding the contract must put the other party *in statu quo*, but this rule will not apply in all cases. Where the infant has received on a contract property of a fixed character, and still has it *in specie*, it would seem that he must restore it when he rescinds the contract. Thus, if he has bought land, and on coming of age brings suit to recover the purchase-money, the land reverts to the seller. An equitable rule, and one which is countenanced by many cases, would seem to be this: When the infant avoids a contract upon which he has received money or property, the legal title to such property reverts in the original owner. But if the property has meanwhile passed into the hands of innocent third parties for value, and is of such a nature that such third parties might properly and confidently receive it from the infant, the original owner cannot retake it. And the infant cannot be held liable for its value, as this would entirely abrogate his defence of infancy. The same rule applies where the infant has consumed the property. See *Reeve, Dom. Rel.* 244; *Breed v. Judd*, 1 Gray, Mass. 455.

⁴⁷ *United States v. Bainbridge*, 1 Mas. C. C. 71; *Commonwealth v. Murray*, 4 Binn. Penn. 487.

⁴⁸ *Coke, Litt.* 79 b.; 1 Rolle, Abr. 341; *Bacon, Abr. Infancy* (A).

When an infant acts as an attorney, or trustee, or executor, his acts will in general be binding, because the *cestui que trust* has a right, if he chooses, to take the risk of the infant's competency.

Contracts for necessities are considered for the benefit of the infant, and consequently binding.⁴⁹

592. In contemplation of law a married woman has no separate existence from that of her husband, they in law forming but one person, and in case of a difference of opinion, his is to govern.⁵⁰ She has therefore no independent capacity to contract.⁵¹ When a contract is made by her, for her advantage, her husband may approve of it, and enforce its performance in an action by himself and wife.⁵² And when a person enters into an obligation or bond to pay a married woman a sum of money, the bond is not void but voidable, and if she survive her husband, the contract will be binding and survive to her.⁵³ A married woman can make no contract to bind her husband, unless he expressly authorizes her,⁵⁴ or the law implies such authority, as where the contract is for necessities;⁵⁵ but if she leaves him on account of her adultery, he is no longer responsible, if the parties she deals with have notice of the fact.⁵⁶

A married woman is able to make contracts when her husband deserts her entirely with intent never to return.⁵⁷

An absence of seven years raises a presumption that the husband is dead.⁵⁸

So a married woman who is divorced *a mensa et thoro* may contract debts as a *feme sole*.⁵⁹

The statutes of the different states have changed the rules of the common law to a great extent, and a married woman in many states may contract in regard to her separate property, the consent of her husband being required.⁶⁰

593. Trustees, executors, administrators, guardians, attorneys, and all other persons who act in a fiduciary capacity, are incapable of becoming parties to contracts personally which they make for the benefit of others.⁶¹

594. Alien enemies cannot in general contract with American citizens without the license of the government, either express or implied.⁶²

595. Seamen are considered to be improvident by nature, and the law protects them somewhat after the manner of infants, and various statutes have been passed for their benefit. Thus the shipping articles must be in writing,⁶³ and in general all contracts made by seamen are liberally interpreted.

596. When slavery existed in this country a slave could make no valid contract. It is provided in some states that spendthrifts may be placed under guardianship, and they are then treated as infants and can make no valid con-

⁴⁹ An infant who obtains necessities suitable to his condition is bound to pay only what they are worth, although he may have made a contract for more. If he has given a note or bond for the necessities, the court will set it aside and award only a reasonable sum. *Stone v. Dennison*, 13 Pick. Mass. 6; *Earle v. Reed*, 10 Metc. Mass. 387; *Bradley v. Pratt*, 23 Vt. 378.

⁵⁰ Littleton, s. 28.

⁵¹ Comyn, Dig. *Pleader*, 2 A. 1; *Baron and Feme*, W.

⁵² 2 Maule & S. 396, n. (b); 2 W. Blackst. 1236.

⁵³ *Brown v. Langford*, 3 Bibb, Ky. 497. ⁵⁴ *Webster v. McGinnis*, 5 Binn. Penn. 235.

⁵⁵ *Cunningham v. Irwin*, 7 Serg. & R. Penn. 247; *McGahey v. Williams*, 12 Johns. N. Y. 293.

⁵⁶ *Hunter v. Boucher*, 3 Pick. Mass. 280.

⁵⁷ *Gregory v. Pierce*, 4 Metc. Mass. 478; *Ayer v. Warren*, 47 Me. 230.

⁵⁸ *King v. Paddock*, 18 Johns. N. Y. 141.

⁵⁹ *Pierce v. Burnham*, 4 Metc. Mass. 303.

⁶⁰ See the Statutes collected in 1 Parsons, Contr. 5th ed. 371.

⁶¹ *Den v. Wright*, 2 Halst. N. J. 175; *Sheldon v. Sheldon*, 13 Johns. N. Y. 220; *Campbell v. Penn. Life Ins. Co.*, 2 Whart. Penn. 53; *Jackson v. Walsh*, 14 Johns. N. Y. 407; 7 Watts, Penn. 387; 3 Binn. Penn. 54; 13 Serg. & R. Penn. 210; 5 Watts, Penn. 304.

⁶² 1 Kent, Comm. 163, 4th ed.

⁶³ Acts of Congr. July 20, 1790, 1 Stat. 131; July 20, 1840, 5 Stat. 396.

tracts. In England persons attainted or excommunicated were unable to contract, but these disabilities have no application in this country.

597. No contract can exist unless there be something for its object. *The object of a contract* may be a thing, properly speaking (*res*), which the obligor agrees to deliver; or an act (*factum*) which the obligor binds himself to perform or not to do. Not only things, properly speaking, may be the object of a contract, but simply their use or possession; for example, when a horse is hired, it is the use of the horse rather than the animal which is the object of the agreement, and when one gives a thing in pledge, it is rather the possession of the thing than the thing itself which is given. Other examples will suggest themselves.

598. Things, taken in their most extensive acceptation, from which man may obtain some use, advantage, or benefit, may be the object of a contract. They may be things present which the contracting party has in possession, or they may be such as have only a potential existence; as the next year's corn, the next cast of a fisherman's net, the good-will of a trade.⁶⁴

599. But there is an exception to the general rule that future things may lawfully be the object of a contract in the case of an expectancy, or the right of the heir apparent to an estate; this cannot be sold.⁶⁵ This exception, however, does not apply to a marriage settlement.⁶⁶

600. But whether present or future, the thing which is the object of the contract must be possible, ascertained, useful to one of the contracting parties, in commerce, not forbidden by law.

601. An *impossibility* is that which cannot be done agreeably to the order of nature. It is a maxim that no one is bound to perform an impossibility: *à l'impossible nul n'est tenu*.⁶⁷ But it is proper to consider what is the nature of an impossibility. It is either absolute when it applies to every one, or relative when it exists with regard to certain individuals only. Again, the thing may be impossible at the time of the agreement, or it may become so afterward.

It is evident that if one promise to perform an act absolutely impossible, the contract is void; as a promise to deliver alive a horse which was dead at the time of the agreement, when the death of the horse was unknown to the person binding himself to deliver him.

But if the impossibility be only relative, if the promise could be performed by another, although the promisor is incapable to perform it, as, if a person totally ignorant of navigation should undertake to navigate a ship to Europe, or a blacksmith to make a coat, the obligor would be bound.

When a contract depends upon an impossible condition which is to be performed, it is null; when the condition is that the party shall not perform the impossibility, then the contract is binding.

When such a contract depends upon a precedent condition, which becomes impossible by the act of God, as if an estate is to arise or a duty to commence on such precedent condition, it can never have effect.⁶⁸

⁶⁴ Dig. 18, 1, 8; *Grantham v. Hawley*, Hob. 132; *Robinson v. McDonnell*, 5 Maule & S. 228; *Robinson v. Mauldin*, 11 Ala. 977.

⁶⁵ *Bouvier*, Law Dict. *Catching Bargain*; *Careton v. Leighton*, 3 Mer. Ch. 667; *Earl of Portmore v. Taylor*, 4 Sim. Ch. 482; *Gibson v. Jeyes*, 6 Ves. Ch. 266; *Peacock v. Evans*, 16 Ves. Ch. 512.

⁶⁶ 1 Kent, Comm. 468, n. b. 4th ed.

⁶⁷ 1 Swift. Dig. Conn. 93.

⁶⁸ "If the condition of a bond be impossible at the time of the making thereof, as for the obligor to go to Rome the next day, the bond is single, for it is the same as if there were no condition at all; and a feoffment on condition that the feoffee go to Rome on a day is absolute, for the condition is repugnant to the feoffment; but if an estate be to arise, or a duty to commence on a precedent condition that is impossible, they can never have effect." *Bacon*, Abr. *Condition*, M. N.; *Coke*, Litt. 206; *Rolle*, Abr. 420. In an old case, where the

602. To make a valid contract, the matter which is to be the subject of it ought to be *determinate*, for if the thing which is its object is so described that it cannot be known, there is no contract; as, if the obligor had promised to do something, or to sell an animal, such promise would be considered as void.⁶⁰ But if the object of the agreement can be ascertained, although the individual thing be not mentioned as a horse, the contract is valid; in that case the seller is acquitted of his obligation by delivering a horse, and he has the choice to say which horse he will deliver.⁷⁰

He has the right of election, that is, the right to choose which of two or more things he will do; it being a rule in cases of election that he who is to do the first act, has the right of election.⁷¹

603. According to the civilians, an agreement by which the contracting party binds himself to perform a perfectly *useless thing*, is void; as, if he engages not to go out of his house for a month.⁷² The law will not allow one man to alienate part of his liberty without a just reason, nor another, by a vain caprice, to cramp his freedom. Besides, the only remedy of the obligee for a violation of an agreement is to recover damages for its breach, and none could be recovered where none had been sustained, as it is impossible to fix any value on things which are entirely useless.

But it is not easy to say what is perfectly useless. If I am bound to deliver to you a Greek book, which you cannot read, and which you never will learn to read, still it is useful, because you may sell it or exchange it, and by that means derive some pecuniary advantage; and it is the pecuniary benefit which the law considers, in order to judge whether the agreement is obligatory or not.

604. In this country there are but few *things* which cannot be bought and sold, or which are *out of commerce*. We have seen, when considering the nature of property, that some things in consequence of their nature cannot be appropriated, such as the air, the sea, rivers, and other things, which belong to no one, but of which every one has the use.

Sovereign rights, such as the right to vote, to nominate to office, or to hold an office, cannot be the object of a contract.⁷³

A freeman cannot be sold, or sell himself to others as a slave.

There are some things which are used by the public, which though not in commerce, because they are required for public use, and because no one has authority to sell them, yet might be sold by special power to be given by law for that purpose; as, for example, public roads which belong to the commonwealth; or they may be vacated, and the soil will in general revert to the former owner.

605. When a contract has for its object the performance of an *unlawful act*,

defendant promised to give the plaintiff for a horse, a barleycorn a nail, doubling every nail, the court directed a verdict for the horse. *James v. Morgan*, 1 Lev. 111. The law on the subject of impossible contracts is this: the contract is void where the thing to be performed is physically impossible, and known to be so at the time. But the contract will not be void when the thing becomes impossible by inevitable accident or act of Providence after the making of the contract; for the parties should have provided for this. *Adams v. Nichols*, 12 Pick. Mass. 275; *Walton v. Waterhouse*, 2 Wms. Saund. 422, n.

⁶⁰ *Worthington v. Hylyer*, 4 Mass. 196; *United States v. Cantrie*, 4 Cranch, 167.

⁷⁰ Coke, Litt. 145 a; *Pothier, Obl. n. 247*.

⁷¹ *Bacon, Abr. Election, B; 2 Pothier, Obl. Evans, ed. 46; Coke, Litt. 145 a*. But where one of two things is to be done by a certain day, if the obligor let the day pass without performing one or the other, the obligee may then elect. *M'Nitt v. Clark*, 7 Johns. N. Y. 465; *Price v. Nixon*, 5 Taunt. 338.

⁷² *Wolffius, Inst. Jur. part 3, § 798, 799*.

⁷³ *Outon v. Rodes*, 3 Marsh. 433; *Carlton v. Whitcher*, 5 N. H. 196; *Cardigan v. Page*, 6 N. H. 183; *Tappan v. Brown*, 9 Wend. N. Y. 175.

as a covenant to rob or kill a man, or to commit a breach of the peace, it is absolutely null and void.⁷⁴

606. A contract entered into in violation of a statute, which declares it void, is absolutely so.⁷⁵ If only a part is void by statute, the other part is valid, if it can be separated. A case of very common occurrence is where a part is void by the statute of frauds.⁷⁶

In general, where a statute merely inflicts a penalty, the contract will be void.⁷⁷

607. An agreement against public policy is void. Thus, if parties agree not to bid against each other at an auction, the agreement is void;⁷⁸ but they may associate honestly and fairly to purchase the property together.⁷⁹ An agreement to reprint a book in violation of a copy right is void.⁸⁰

608. An agreement in general or total restraint of trade is void. Such an agreement is where one binds himself not to carry on a particular trade at all, or within limits so broad as effectually to deprive the public of his services. It may be limited as to time or place. If there is no limitation as to place, the contract is void, but the agreement may be perpetual in time and yet valid. A limitation is reasonable, if it is no more than is sufficient for the protection of the other party.⁸¹

609. A contract which has for its object champerty or maintenance, is, in general, void.⁸² And so is a contract for future illegal cohabitation, though one made for past cohabitation is valid.⁸³

610. In general, *choses in action* cannot be the subject of a contract at law, but they are assignable in equity; to this, however, there are exceptions, as where the chose in action is assignable by the law merchant, as bills of exchange and promissory notes, or where it is so assignable by virtue of some statutory provision.⁸⁴

At common law the assignment of a *chose in action* is regarded as an authority to the assignee to sue on the contract in the name of the assignor, which authority, being coupled with an interest, is irrevocable, and the assignor cannot interfere.⁸⁵ And in negotiable contracts the contract by its terms or by the law merchant is regarded as made with the assignee, who may sue in his own name. But in contracts not negotiable the assignee cannot sue in his own name unless a new promise or contract is made to him by the obligor.⁸⁶ By statute many contracts are made assignable, so that the assignee may sue in his own

⁷⁴ Sheppard, Touchst. 163; Coke, Litt. 206, b. A distinction was formerly made between *malum in se* and *malum prohibitum*, as affecting the validity of a contract, but no such distinction is now made, and in either case the contract is equally void. *White v. Buss*, 3 Cush. Mass. 450.

⁷⁵ *Mabin v. Coulon*, 4 Dall. 298; *Biddis v. James*, 6 Binn. Penn. 321; *Seidenbender v. Charles*, 4 Serg. & R. Penn. 159.

⁷⁶ *Irvine v. Stone*, 6 Cush. Mass. 508; *Rand v. Mather*, 11 Cush. Mass. 1.

⁷⁷ *Nichols v. Ruggles*, 3 Day, Conn. 145; *Mitchell v. Smith*, 4 Yeates, Penn. 84.

⁷⁸ *Toler v. Armstrong*, 11 Wheat. 258; *Thompson v. Davies*, 13 Johns. N. Y. 112; *Gardiner v. Morse*, 25 Me. 140.

⁷⁹ *Phippen v. Stickney*, 3 Metc. Mass. 384; *Small v. Jones*, 6 Watts & S. Penn. 122.

⁸⁰ *Nichols v. Ruggles*, 3 Day, Conn. 145.

⁸¹ *Pierce v. Fuller*, 8 Mass. 223; *Perkins v. Lyman*, 9 Mass. 532.

⁸² *Thurston v. Percival*, 1 Pick. Mass. 415; *Redman v. Sanders*, 2 Dan. Ky. 70; *Spencer v. King*, 5 Ohio, 183; *Whitaker v. Cone*, 2 Johns. N. Y. 58.

⁸³ Bacon, Abr. *Obligations*, E.

⁸⁴ *White v. Buck*, 7 B. Monr. Ky. 546; *Lewis v. United States*, 1 Morr. Iowa, 199; *Lacey v. Lacey*, 7 Penn. St. 251.

⁸⁵ *Welch v. Mandeville*, 1 Wheat. 233; 5 id. 277; *Riley v. Taber*, 9 Gray, Mass. 373; *Pass v. McRae*, 36 Miss. 143.

⁸⁶ *Currier v. Hodgdon*, 3 N. H. 82; *Clarke v. Thompson*, 2 R. I. 146; *Warren v. Wheeler*, 21 Me. 484; *Rollison v. Hope*, 18 Tex. 446.

name, and some of the states have abolished the distinctions between law and equity in this respect to a considerable extent.

611. A *consideration* is the motive or reason which moves the contracting party to enter into a contract;⁸⁷ it is the cause or inducement of the agreement: *id quod inducit ad contrahendum*.

A consideration of some sort or other is so absolutely requisite to the formation of a good contract that a *nudum pactum*, or an agreement to do or to pay any thing on one side without any compensation to the other, is absolutely void in law.⁸⁸ But it must be remembered that some contracts, owing to their form, import a consideration, and it is not required to prove one, as a bond, specialty or deed, and a bill of exchange or promissory note.⁸⁹

The consideration must be some benefit to the party by whom the promise is made, or to a third person at his instance; or some detriment must be sustained, at the instance of the party promising, by the party in whose favor the promise is made,⁹⁰ as forbearance to sue,⁹¹ a mutual promise,⁹² the compromise of a doubtful claim.⁹³

612. When considered as to their kinds, considerations are good or valuable; when as to their effect, they are legal or illegal; when as to their nature, they are moral or immoral; when in respect to time, they are executed or executory; they are also concurrent and continuing, divisible and indivisible.

613. A *good consideration* is that which arises from relationship or the ties of blood, or natural love and affection; as when a man grants an estate to a near relation, for that and for no other reason. Such a consideration is sufficient to support a contract between the parties, but not against the creditors of a grantor. The statutes of 27 Eliz. c. 4, and 13 Eliz. c. 5, make such voluntary conveyances void against creditors. The principles of these statutes, which have indeed been copied from the civil or Roman law,⁹⁴ though they may not have been substantially re-enacted, prevail generally throughout the United States.⁹⁵

614. A *valuable consideration* is where some benefit arises to the party who makes a contract or promise, or some loss or inconvenience to the other party. This may be by the payment of money or of any other thing, or the promise to pay money or to deliver any other thing, or to perform or refrain from doing any act whatever.⁹⁶ The amount is immaterial.⁹⁷

615. Valuable considerations may be divided into various classes: such as arise from benefit and injury; forbearance; mutual promises; assignment of a chose in action; consideration moving from third persons.

⁸⁷ 2 Sharswood, Blackst. Comm. 443; Viner, Abr. *Consideration*, A.

⁸⁸ Doct. & S. Dial. 2, c. 24.

⁸⁹ 2 Sharswood, Blackst. Comm. 445; *Schuylkill Nav. Co. v. Harris*, 5 Watts & S. Penn. 28. The rule that no consideration is necessary on a note or bill only applies when the note is in the hands of a third party who has given value. As between the original parties the note is void for want of consideration, like any other contract. But it is manifestly impossible for merchants in the course of business to inquire into the consideration of the notes which come into their hands.

⁹⁰ *Miller v. Drake*, 1 Caines, N. Y. 45; *Powell v. Brown*, 3 Johns. N. Y. 100; *Townley v. Sumrall*, 2 Pet. 182; *Seaman v. Seaman*, 12 Wend. N. Y. 381; *Violett v. Patton*, 5 Cranch, 142; *Gray v. Brackenridge*, 2 Penn. 75.

⁹¹ *Lonsdale v. Brown*, 4 Wash. C. C. 148; *Sidwell v. Evans*, 1 Penn. 385; *Lemaster v. Burckhart*, 2 Bibb Ky. 30.

⁹² *Society in Troy v. Perry*, 6 N. H. 164; *Wightman v. Coates*, 15 Mass. 1; *Willard v. Stone*, 7 Cow. N. Y. 29.

⁹³ *Zane v. Zane*, 6 Munf. Va. 406; *Hoge v. Hoge*, 1 Watts, Penn. 216.

⁹⁴ Dig. 42, 8, 25, 11; 2 Bell, Comm. 182.

⁹⁵ Bouvier, Law Dict. *Voluntary Conveyances*.

⁹⁶ *Violett v. Patton*, 5 Cranch, 142.

⁹⁷ *Stewart v. the State*, 2 Har. & G. Md. 114; *Knobb v. Lindsey*, 5 Ohio, 471.

616. The essence of every valuable consideration is, that it should create some benefit to the party promising, or cause some loss, trouble, inconvenience or prejudice to the party to whom the promise is made.⁹⁸ The amount of benefit received, or inconvenience suffered, is of no consequence,⁹⁹ unless the consideration is so insignificant in comparison as to make the contract unconscionable on its face, and therefore void.¹⁰⁰

617. By *forbearance* is understood the act by which a creditor waits for the payment of the debt due to him by the debtor, after it has become due; in other words, it is an agreement by a creditor with his debtor not to sue him for some time, when he has the right to sue immediately. This being a benefit to one party, and an inconvenience to the other, is a sufficient consideration.¹⁰¹

To be valid, the forbearance must suspend the right to sue until the time agreed upon has passed.¹⁰² It must be of some right, but even a doubtful claim will be sufficient for this purpose.¹⁰³

Forbearance to sue a debtor is a good consideration, if definite in time, or even if of considerable or reasonable time. But there must be an actual forbearance, and the creditor must have had a power of enforcement. But the fact that it is doubtful whether such a power exists does not injure the consideration. A short forbearance, or the deferment of a remedy, as postponement of a trial, or postponement of arrest, may be a good consideration. A mere agreement not to push an execution is too vague to be a consideration. The forbearance must be made by agreement as well as in fact.

618. *Mutual promises*, made at the same time, and in the same transaction, are binding on both parties, unless one be absolutely void, for then they are not binding on either. But if a promise be voidable, as in the case of an infant, the other is bound until the infant shall avoid it.¹⁰⁴

Mutual promises must be made at the same time, otherwise they cannot be said to be the consideration of each other. This is in accordance with the general rule that the agreement must be concurrent; one promise must be made first, but it must continue until the other is made, when the concurrence of minds necessary to a contract takes place.¹⁰⁵

Subscription papers, where the subscribers promise to pay certain sums for a common object, are enforceable as contracts, where any thing has been done or any liability assumed, in reliance upon the subscription paper.¹⁰⁶

619. The *assignment of a chose in action* is a sufficient consideration of a promise by the debtor to pay the assignee; if, for example, Paul assign Peter a bond by mere endorsement, the legal title to sue will remain in Paul, but the equitable right to receive the money will be in Peter; now if the debtor make a promise to Peter to pay him the money due on the bond, the latter may recover the amount in action upon this last promise.¹⁰⁷

⁹⁸ Comyn, Dig. *Action on the case upon assumpsit*, B. 1; Bacon, Abr. *Agreements*, B. 2.

⁹⁹ Knight v. Rushworth, Croke, Eliz. 469; Brooks v. Ball, 18 Johns. N. Y. 337; Wilkinson v. Oliveira, 1 Bingh. N. C. 490.

¹⁰⁰ Schnell v. Nell, 17 Ind. 29; Shepard v. Rhodes, 7 R. I. 470.

¹⁰¹ Etting v. Vandelyn, 4 Johns. N. Y. 237; 2 Nott & M'C. So. C. 133; Hamaker v. Eberly, 2 Binn. Penn. 506.

¹⁰² Comyn, Dig. *Action on the case*; Dane, Abr. *Index*.

¹⁰³ Thornton v. Fairlie, 2 Moore, 397; Richardson v. Mellish, 2 Bingh. 229.

¹⁰⁴ Comyn, Dig. *Action on the case upon assumpsit*, B. 14; Willard v. Stone, 7 Cow. N. Y. 22; Boynton v. Kellogg, 3 Mass. 189.

¹⁰⁵ Livingston v. Rogers, 1 Caines, N. Y. 583; Tucker v. Woods, 12 Johns. N. Y. 190.

¹⁰⁶ Mirick v. French, 2 Gray, Mass. 420; Underwood v. Waldron, 12 Mich. 73; Commissioners v. Perry, 5 Ohio, 59; Pierce v. Ruley, 5 Ind. 69; George v. Harris, 4 N. H. 533; M'Auley v. Billinger, 20 Johns. N. Y. 89.

¹⁰⁷ Lang v. Fiske, 11 Me. 385; Mowry v. Todd, 12 Mass. 281.

620. In simple contracts, if one person make a promise to another, who furnished the consideration, for the benefit of a third, although no consideration move from such third person, it is binding, and either party to whom it is made may maintain an action upon it, provided there be a privity between the parties.¹⁰³

It is sometimes considered that the contract can only arise in this case where the party furnishing the consideration, from privity or otherwise, may be regarded as the agent of the party to be benefited; and this rule is sufficient to support all cases where the parties stand in relationship to each other, as father and son.¹⁰⁹

But the rights of a party at law rest on a broader basis than this, though it may be doubtful whether a technical contract exists. It has even been laid down broadly that a suit will lie in all cases where one has money or property which in equity and good conscience belongs to another. And it is now held that where a principal puts money into the hands of his agent to pay to a third party, the agent agreeing so to pay it may be sued by such third party.¹¹⁰

621. A *legal consideration* is one which is authorized by law; these are always sufficient to support a contract.¹¹¹ In contradistinction to a moral obligation, such consideration is one which may be enforced at law.

622. An *illegal consideration* is one forbidden, or which is against policy or good morals; a contract founded on such a consideration cannot be enforced; as, where it is usurious,¹¹² or it is for future illicit cohabitation,¹¹³ or for lodgings let for the purpose of prostitution,¹¹⁴ or for printing a libel.¹¹⁵

If a contract grow immediately out of an immoral or illegal act, or be connected with it, it is invalid. But if it be wholly disconnected from the illegal act, and founded on a new and independent consideration, it may be enforced, though the illegal act was known to the party to whom the promise was made, and he was the contriver of it.¹¹⁶

It is proper to remark that in a contract the act to be done by either party may be regarded as the consideration, the two acts being mutually considerations of each other. A contract on an illegal consideration is therefore the same thing as a contract to do an illegal act, which is considered hereafter.

623. A *moral obligation* is the duty which one owes, and which he ought to perform, but which he is not legally bound to fulfil. A distinction must be made between those which are founded on a natural right, as the obligation to be charitable, to be grateful, and the like, and those which are supported by an antecedent good and valuable consideration; as, to pay a debt barred by the act of limitation, or from which the debtor is discharged by the bankrupt laws. The former are not a sufficient consideration to support a contract, but the latter will be sufficient.¹¹⁷

¹⁰⁶ Hammond, Part. 79; Tipper v. Bicknell, 3 Bingh. N. C. 710; Wilson v. Coupland, 5 Barnew. & Ald. 228.

¹⁰⁹ Felton v. Dickinson, 10 Mass. 287; Dutton v. Poole, 1 Vent. 318.

¹¹⁰ Laurence v. Fox, 20 N. Y. 263; Keller v. Rhoads, 39 Penn. St. 513; Arnold v. Lyman, 17 Mass. 400.

¹¹¹ Cook v. Bradley, 7 Conn. 57.

¹¹² Solomon v. Jones, 3 Brev. So. C. 54.

¹¹³ 3 Burr. 1568.

¹¹⁴ 1 Bos. & P. 340; 1 Esp. 13.

¹¹⁵ Poplett v. Stockdale, Chitty, Contr. 217, Am. ed. 1827.

¹¹⁶ Hodgson v. Temple, 5 Taunt. 181; Toler v. Armstrong, 4 Wash. C. C. 297; 11 Wheat. 258.

¹¹⁷ Lonsdale v. Brown, 4 Wash. C. C. 86, 148; Wiling v. Peters, 12 Serg. & R. Penn. 177; Scouton v. Eislord, 7 Johns. N. Y. 36; Maxim v. Morse, 8 Mass. 127.

A distinction is made between cases where a claim has been discharged by operation of law, and where it has been released voluntarily. In the first case the obligation supports the new promise, in the last it does not. Warren v. Whitney, 24 Me. 562; Shepard v. Rhodes, 7 R. I. 474; Montgomery v. Lampton, 3 Metc. Ky. 519.

624. An *immoral consideration* is one contrary to good morals, and is therefore invalid. It is not sufficient to support a contract; as, if a man were to give his obligation to a woman upon condition she would live with him in adultery, the obligee could not recover.¹¹⁸

625. An *executed consideration* is one that is past; as, for example, where the defendant gave the plaintiff a writing as follows: "In consideration of your having endorsed the following mentioned notes, drawn by A in your favor, we do hereby hold ourselves accountable to you for them, in the same manner as though said notes were drawn by us."¹¹⁹ A past or executed consideration, is, in general, insufficient to support a contract,¹²⁰ but a promise to pay a sum of money on a consideration executed, if it was induced by the request of the defendant, or for some previous duty, or if the debt be continuing at the time, or it is barred by some rule of law, or some provision of a statute, as the act of limitations, is sufficient to maintain an action.¹²¹

The doctrine as to executed considerations takes its rise from the introduction of the action of assumpsit, and the rules of pleading. In this action it is necessary to aver that the defendant promised, and to set forth a valid consideration for the promise. Unless therefore the pleadings show a concurrence in time, they do not show a valid contract, as we have stated in the case of mutual promises. Most of the old cases on this subject will be found therefore to turn on a point of pleading, where the real contract was valid, but badly pleaded. But the rule as to the facts remains as strict as ever, and the contract will be void unless some consideration continues to the time of the promise. The law is thus well laid down: "A consideration altogether executed and past is not good to maintain an assumpsit; but if it were moved by a precedent request it is good, and amounts to a promise; for it is not reasonable that one man should do another a kindness, and then charge him with a recompense."¹²²

626. An *executory consideration* is one which is to be performed; as, if a man promises to pay another one hundred dollars, at a future time, for a horse. Executory considerations, when the subject of them is not unlawful, are always sufficient.

627. A *concurrent consideration* is one which is given by one party, at the same time that another is given to him; such considerations are mutual and binding; as mutual promises between a man and a woman, both capable of marrying, that they will marry each other.¹²³ In general, the promises must be reciprocally binding, but the promise of an infant to marry another is sufficient.¹²⁴

628. A *continuing consideration* is one which in point of time remains good and binding, although it may have served before to support a contract; as, in consideration that the defendant had become, and was, the plaintiff's tenant, he undertook to manage the farm in a husbandlike manner.¹²⁵ Such a consideration is in many cases sufficient to support a promise.

¹¹⁸ 3 Burr, 1568.

¹¹⁹ Bulkley v. Landon, 2 Conn. 404.

¹²⁰ Comstock v. Smith, 7 Johns. N. Y. 87; Livingston v. Rogers, 1 Caines, N. Y. 584; Chaffee v. Thomas, 7 Cow. N. Y. 358.

¹²¹ Lonsdale v. Brown, 4 Wash. C. C. 148; Bell v. Morrison, 1 Pet. 373; Cook v. Bradley, 7 Conn. 57; Levy v. Cadet, 17 Serg. & R. Penn. 126; Searight v. Craighead, 1 Penn. 135; Mills v. Wyman, 3 Pick. Mass. 207; Carson v. Clark, 2 Ill. 113.

¹²² Bacon, Abr. *Assumpsit*, D.

¹²³ Willard v. Stone, 7 Cow. N. Y. 22; Babcock v. Wilson, 17 Me. 372; Whitehead v. Potter, 4 Ired. No. C. 257; Boyd v. Fox, 8 Mo. 574.

¹²⁴ Willard v. Stone, 7 Cow. N. Y. 22.

¹²⁵ 1 Saund 320, e, note (5); Loomis v. Newhall, 15 Pick. Mass. 159; Andrews v. Ives, 3 Conn. 368.

629. When a consideration consists of one entire thing, it is said to be *entire* or *indivisible*; when of several things, it is *divisible*.

It is a general rule, that when the consideration consists of several distinct matters, each having a fixed value, and some of such matters are illegal, the contract is void *pro tanto*, but it is supported by what is lawful.¹²⁶ But if the entire consideration of a contract is against law, the contract is void *in toto*.¹²⁷

630. Few men enter into a contract without a consideration, but sometimes the consideration is only apparent and not real. It may be, first, that the cause or motive which induced me to enter into an engagement may never have existed, or ceased to exist at the time of making the contract; secondly, the consideration which induced me to contract, and which existed only in hope, may have failed; it is evident, then, that my engagement was made without consideration.

631. As an example of the first kind, may be mentioned the case where a man who is heir at law of another, finding a will made by the latter by which he bequeathed a thousand dollars to a third person, gives his obligation to such third person for that sum, and afterward discovers a codicil by which the legacy is revoked, the obligor will not be bound to pay his obligation, because the consideration has wholly failed; for where one through a mistake acknowledges himself under an obligation which the law does not impose upon him, he is not bound by it.¹²⁸

632. An agreement to pay a sum of money for a tract of land, when in fact the land was the obligor's already, is an example of the second class; another example may be mentioned of a man who agreed to purchase another's obligation, and it was afterward discovered such obligation was forged. A total failure of consideration and a want of consideration is the same thing.

Where a deed of land is given with covenants of warranty a total failure of title will avoid the deed and the price cannot be recovered.¹²⁹ But a partial failure will not avoid the deed, and is no defence to an action for the price, though to avoid circuity of action it is often a defence *pro tanto* in reduction of damages.

633. The immediate effect of a contract is to produce a right in favor of one of the contracting parties, and to impose a corresponding obligation or duty upon the other. These rights and duties vary *in infinitum*; they depend upon the nature and the object of the contract and on the clauses and conditions which the parties have agreed upon. But still there are numerous effects which are common to all contracts, whatever may be their nature, or whatever clauses may have been agreed upon; these will be considered first. Then the effects common to certain kinds of agreements will be examined, as the agreement to deliver and the obligation to do or not to do a particular thing. The question of damages will form the next subject. Lastly, we shall treat of the construction of agreements, and of agreements as affecting third persons.

634. The first and the principal effect of all contracts is to confer on each of the contracting parties the reciprocal right to constrain the other to execute them, to bind the parties and to oblige them as firmly as the law would have done. The law sanctions agreements; it lends them its aid when made conformably to its requirements, and raises them to the dignity of laws between the

¹²⁶ *Frazier v. Thompson*, 2 Watts & S. Penn. 235.

¹²⁷ *Woodruff v. Hinman*, 11 Vt. 592.

¹²⁸ See *Warder v. Tucker*, 7 Mass. 449; *May v. Coffin*, 4 Mass. 347; *McDonald v. Neilson*, 2 Cow. N. Y. 139; *Freeman v. Baynton*, 7 Mass. 483; *Pothier, Obl. part 1, c. 1, a. 3, § 8*; *Addison, Contr.* 25.

¹²⁹ *Frisbee v. Hoffnagle*, 11 Johns. N. Y. 50; *Trask v. Vinson*, 20 Pick. Mass. 110; *Tillotson v. Grapes*, 4 N. H. 448; *Cook v. Mix*, 11 Conn. 432; *Davis v. McVickers*, 11 Ill. 827; *Contra Jenness v. Parker*, 24 Me. 289.

parties. But although they are laws, they are but private laws, always within the power of the contracting parties, and they may be revoked, changed or modified at their pleasure while they do not affect the rights of third persons. When the contract confers a right of that kind on a stranger, it cannot be changed by the contracting parties; for example, where a trust is created for the benefit of a third person, unknown to him, he may subsequently enforce it.¹³⁰

635. Another effect of a contract is, that all matters of equity and of usage are to be taken as a part of the contract, according to its nature. In considering the nature or substance of a contract, three things may be distinguished: what is of its essence and substance; what belongs to its nature; what is accidental to it.

636. Things which form the *essence* of the contract are those without which it cannot subsist, a want of one of which renders the contract null, or changes it to another contract; for example, it is of the essence of a sale that there be a thing which is the subject matter of the contract, a price in money, and the consent of the parties as to the thing and as to the price: *res, pretium, et consensus*. If one of these three is wanting, it is evident that there is no contract, or that the agreement is not a sale.

There is no contract if the consent has been given in mistake or obtained by fraud, because then there is no agreement.

There is no contract if the thing contracted for was not in existence; as if I buy your house, and, at the time, it had been destroyed by fire; or your horse, and, at the time, he was dead.

There is no consideration if I sell you a clock, which I received from my father as a legacy, for the price my father gave for it, and it turns out that my father had received it from his uncle as a gift.

There is no price if I sell you a piece of personal property for another which you sell to me; in that case there is no contract of sale, because it is of the essence of that contract that there should be a price paid in money; the contract is an exchange or barter. In the first three cases there is no contract whatever, and in the last a different one.

637. The things which form the *nature* of the contract, are those which, without being of its essence, are nevertheless a part of it, although the contracting parties have not said any thing about them; these are things understood to exist at the time, namely, usage and equity.¹³¹ But such usage or custom must not be opposed to law.¹³² And it will have no effect, if the parties have expressly so agreed.¹³³

The difference between those things which are of the essence, and those which are of the nature, of the contract, is this: the contract cannot subsist if one thing which is of its essence be wanting, as a price in a sale; but it may be good although one thing partaking of its nature be absent; as in the case of a loan, it is of its nature that the thing loaned should be at the risk of the lender, but the parties may agree that it shall be at the risk of the borrower, and the contract remains the same.

638. The things which are *accidental* to the contract are those which not being understood, either in law, usage, or equity, are not mentioned in a special clause in the agreement; for example, credit being given on a sale, is acci-

¹³⁰ *Berley v. Taylor*, 5 Hill, N. Y. 577.

¹³¹ *Shultz v. Dickey*, 5 Binn. Penn. 287; *Lodwicks v. Ohio Ins. Co.*, 5 Ohio 436; *Sewall v. Gibbs*, 1 Hall, N. Y. 612; *Barber v. Brace*, 3 Conn. 9; *United States v. Arredondo*, 6 Pet. 715; *Sampson v. Gazzam*, 15 Ala. 123.

¹³² *Scheffelin v. Harvey*, Anth. N. Y. 56.

¹³³ *Wayne v. Steamboat General Pike* 16 Ohio, 421.

dental to that contract; the price must be paid in cash where nothing is said about it.¹³⁴

639. In general, when by the agreement the contracting party obligates himself to deliver the thing which is the object of the contract, without any specific designation of the thing, as to deliver a hundred bushels of corn, or to deliver a horse, or to pay a sum of money, he is bound to deliver or to pay these, notwithstanding he may have set such aside for the purpose of completing his engagement, and they have been destroyed; for, in these cases, the rule is *res perit domino*.

And, for the same reason, the contractor may sell them, and the purchaser will have a good title, or he may bequeath them by his will, and they will be no further liable for the contract than to be subject to the payment of his debts.

640. But when the parties have agreed upon a specific article, the one loses and the other acquires the title to it; as, if A sell a particular horse to B, or one hundred bushels of corn, which have been measured, and separated from the rest of the seller's corn, the title passes, so as to render the purchaser liable for all losses occasioned by the destruction of the property, subject, however, to the right of the seller to demand payment before he parts with it.¹³⁵

641. Man may engage his services and his actions in every thing which is not forbidden by law, public order or good morals; but the obligations arising from such engagements differ from obligations to deliver property as to their effect. If I have promised for a valuable consideration to deliver you my horse, you may compel me to give up the possession, but if I have agreed to serve you as a clerk, no power on earth can force me to act as your clerk; or if I have done what I promised I would not do, the judge may punish me, but there is no power to recall the past.

In these cases the creditor may recover damages, and these the law presumes are a full satisfaction for the breach of my agreement.

There are some cases when a court of equity will decree a specific performance, and consider that done which it has decreed should be done. But this jurisdiction will not be exercised where there is an adequate remedy at law.¹³⁶

642. If the thing the obligor has bound himself not to do is a thing that can be removed, as the erection of a dam to injure the mill of the obligee, he may be compelled to remove it.

643. A party to a contract is not only bound to fulfil the terms of the contract, but also is liable to other additional obligations. Among these he is liable in the alternative, if he does not fulfil the contract, to make such amends as the law imposes on him. And here a very important distinction arises between law and equity. When a contract is not fulfilled, equity interferes, and by its decree compels the performance of the contract according to its terms. But it does not in general award damages for its non-performance. But the only remedy at law is to award the injured party a definite sum of money as compensation for the wrong: this is known as *damages*. The damages are intended to be commensurate with the injury, and when awarded, take the place of the contract, which from that time confers no further rights.

644. Damages have accrued to the obligee whenever the contract has not been fulfilled at the time and place appointed. The want of execution and

¹³⁴ New York Firemen's Ins. Co. v. De Wolf, 2 Cow. N. Y. 56.

¹³⁵ Simmons v. Swift, 5 Barnew & C. 862; Potter v. Coward, 1 Meigs, Tenn. 22; M'Coy v. Moss, 14 Ala. 88; Smyth v. Craig, 3 Watts & S. Penn. 14; Willis v. Willis, 6 Dan. Ky. 48; People v. Haynes, 14 Wend. N. Y. 546; Howland v. Harris, 4 Mas. C. C. 497.

¹³⁶ Story, Eq. Jur. § 718; Eden, Inj. c. 3, p. 270.

delay arises from three causes: the fraud or want of good faith in the obligor, his fault, and finally, a foreign cause beyond his control, commonly called the act of God, or inevitable accident arising from physical causes.

Whenever the obligor with a design to injure the obligee has not executed his contract, there is a *fraud*. There is a want of *good faith* when, without a design to wrong the obligee, the obligor fails in his engagements for the purpose of getting an advantage to himself; as when a contractor abandons a contract which he has made to get a more profitable one, or when he neglects the affairs of another which he has undertaken to perform to attend to his own, or when he fails in his engagements by the omission of that attention which the most careless take of their own affairs; as if he leave in an open, exposed place a thing which could be easily carried away or injured, which had been confided to him, and loss arise in consequence of it. This is indeed a species of fraud, to prefer knowingly our own interest to the accomplishment of our duty, or not to do those acts toward others which the most careless and the least diligent perform; *magna culpa dolus est*.¹³⁷

No one is allowed to stipulate that he shall not be responsible for fraud or for his wilful neglect.¹³⁸

645. When damages arise from a foreign cause beyond the party's control, no one is bound, in general, to repair the injury: *casum nemo præstat*.¹³⁹ But to this general rule there are several exceptions:

When one of the parties has agreed specially to answer for fortuitous events or for the act of God.¹⁴⁰

When the fortuitous event has been preceded by some fault on his part, without which the loss would not have occurred; as, if a man borrow a horse to go one place, and goes to another, in consequence of which the loss happens.¹⁴¹

When the obligor is in default in completing his contract; as, if a loss happen to the thing borrowed after the time fixed for its return.¹⁴² But to this liability there is a limitation in the case, where the thing would have been equally lost in the hands of the obligee; for in that event it is not the fault of the obligor, and the rule *res perit domino* applies.

In these cases the burden of proof lies upon the party who has neglected to execute his contract, to show that he was justified by a foreign cause.¹⁴³

646. In general, no party can recover damages unless he proves that he has actually suffered a loss. His rights may be invaded without any damage to him, or a damage so small that the law can take no account of it: *de minimis non curat lex*. Such a case is commonly spoken of as *damnum absque injuria*. But there are some exceptions in which nominal damages, that is, any small sum which the jury may agree on, are awarded. There are cases where a right is in dispute, the right and not the damage being the point at issue upon which the parties desire to obtain a decision. Thus, in an action of trespass to decide the title to land, the injury complained of may be insignificant; the real injury is an assertion of title to the land, and for this the court will award nominal damages.¹⁴⁴ Such an assertion coupled with acts, continued for a length of time, endangers

¹³⁷ Dig. 50, 16, 226; *McCracken v. Hair*, 2 Speers, So. C. 256; *Powers v. Mitchell*, 3 Will. 545.

¹³⁸ *Camden R. R. v. Burke*, 13 Wend. N. Y. 611; *Beckman v. Shouse*, 5 Rawle, Penn. 179.

¹³⁹ *Dav v. Ridley*, 16 Vt. 48.

¹⁴⁰ *Gaither v. Barnet*, 2 Brev. So. C. 488.

¹⁴¹ *Tollenere v. Fuller*, 1 Const. So. C. 117.

¹⁴² *Wheelock v. Wheelright*, 5 Mass. 104; *Homer v. Thwing*, 3 Pick. Mass. 492; *Schenck v. Strong*, 1 South. N. J. 87; *McNeilly v. Brooks*, 1 Yerg. Tenn. 75.

¹⁴³ *Murphy v. Staton*, 3 Munf. Va. 239; *Ewart v. Street*, 2 Bail. So. C. 157; *Bell v. Reed*, 4 Binn. Penn. 127.

¹⁴⁴ *Munroe v. Gates*, 48 Me. 463; *Grover v. Sholl*, 42 Penn. St. 58; *Tillotson v. Smith*, 32 N. H. 90.

the plaintiff's title, and constitutes a substantive injury. The same rule is applied in cases of infringement of patents and trade marks, and the rule is thus laid down by Story, J.: "Where the law gives an action for a particular act, the doing of that act imports a damage. Every violation of a right imports some damage, and if none other be proved, the law allows a nominal damage."¹⁴⁵

These exceptions, it will be noticed, are all in cases of tort. In actions for a breach of a contract, the plaintiff cannot recover nominal damages. The exceptions are so few, and upon such peculiar grounds, that the rule may be considered general.

647. The amount of damages to be paid by a party not performing a contract is estimated by certain rules, which are commonly known as the *measure of damages*. It is in general necessary that the plaintiff should show himself to have sustained damage, and also that the contract should furnish the measure of damages.

We have alluded to the exceptions to the first requisite in speaking of nominal damages, and shall make further mention in considering the damages in particular cases.

648. It is now well settled that *the measure of damages is a question of law* to be deduced by the court from the contract. The object is to compensate the plaintiff for the loss he has sustained, and this is a matter of legal interpretation after the facts are established.¹⁴⁶ By compensation is meant such a sum as will put the plaintiff in as good condition as if the contract had not been made. This of course cannot be always done completely, but the law endeavors to come as near as possible. The rule excludes from the consideration of the court the motives of the defendant in breaking the contract. The distinction originally made between cases of tort and contract, prevented the plaintiff from recovering damages for malicious wrongs in an action sounding in contract, but it may be that the growing tendency to obliterate this distinction will allow exemplary damages for wilful breach of contract.¹⁴⁷

649. *Damages* being compensation are intended to *cover the actual loss* of the plaintiff. This does not always include the whole price or consideration named in the agreement. Thus, in cases where the defendant agrees to employ the plaintiff for a certain time, the damages for a breach are not the price for the whole time, but only the price for such time as the plaintiff could not find employment.¹⁴⁸

650. In many cases the contract itself provides expressly for its breach. Thus in case of a bond a sum is inserted called a *penalty*, to be forfeited upon the breach. At common law this and no less was forfeited as damages, but the principles of equity are now generally applied, limiting the amount of damages to the actual loss as in other contracts, but not to exceed the penalty.¹⁴⁹ But the parties may agree upon a sum not as a penalty, but as *liquidated damages*. This the parties may do, but the question in any case whether they have done so is a difficult question of construction considered in another place.¹⁵⁰ But when this is the agreement then the sum agreed on is the only measure of damages.

¹⁴⁵ *Whittemore v. Cutter*, 1 Gall. C. C. 429, 433; *Marsh v. Billings*, 7 Cush. Mass. 322; *Davis v. Kendall*, 2 R. I. 566.

¹⁴⁶ *Bradley v. Denton*, 3 Wisc. 557; *Robinson v. Varnell*, 16 Tex. 382; *Baldwin v. Bennett*, 4 Cal. 392.

¹⁴⁷ See *Sweem v. Steele*, 5 Iowa, 352; *McNair v. Compton*, 35 Penn. St. 23; *Ascutney Bank v. McK. Ormsby*, 28 Vt. 721.

¹⁴⁸ *King v. Steiren*, 44 Penn. St. 99; *McDaniel v. Parks*, 19 Ark. 671; *Bagley v. Smith*, 10 N. Y. 489.

¹⁴⁹ *Berry v. Harris*, 44 N. H. 370; *Ricketson v. Richardson*, 19 Cal. 330.

¹⁵⁰ See beyond, 765.

651. There is a diversity of opinion in regard to the *measure of damages for the breach of covenants* in deeds of real estate. The ordinary covenants are covenants of seisin, against incumbrances, and of warranty. In regard to all of these the general rule holds that no damages are given until an injury is sustained. The covenant of warranty is the most important, and its breach occurs upon eviction of the purchaser, either with or without suit. The courts of Massachusetts, Connecticut, Vermont, Maine and South Carolina adopt as the measure of damages the value of the land at the time of the eviction.¹⁵¹ To this is added in all of these states, except Massachusetts, the costs reasonably incurred in defending the ejectment suit. The other states and the courts of the United States adopt as the measure of damages the consideration money and interest on it.¹⁵² No interest is allowed in Tennessee.¹⁵³ The value at the time of conveyance is generally adopted as the measure of damages in suits for breach of the covenant of seisin.¹⁵⁴

652. Where contracts are made for the payment of a specified amount of money, as in case of *promissory notes and bills of exchange*, the measure of damages is the amount of money to be paid with legal interest from the time it became payable. The law takes no account of any remote damages caused by the non-payment.¹⁵⁵ The holder of a bill of exchange protested for non-payment is entitled to the amount of the bill, interest, re-exchange and proper charges.

653. Where one who contracts to sell an article fails to do so, the measure of damages is the difference between the contract price and the market value at the time for delivery.¹⁵⁶ If the article is paid for in advance, the rule is in doubt. The plaintiff can certainly recover the amount paid in advance. Some of the courts have decided that he can recover the highest market price between the time for delivery and the time of trial.¹⁵⁷ This of course gives increased damages where the price has risen. But the converse of the rule, to diminish the damages when the price has fallen, has never been adopted.

654. In actions against *common carriers* for non-delivery, the measure of damages is the value of the goods with interest from the time they should have been delivered,¹⁵⁸ and the value is the value at the place of delivery.¹⁵⁹ If the goods have been transported by the carrier, he may deduct the freight.¹⁶⁰

655. We have seen that in actions on bills and notes interest is allowed as an arbitrary rule of damages. But interest cannot be awarded *eo nomine* to make up the damages in all cases. In general, no interest can be recovered on unliquidated demands, as open running accounts;¹⁶¹ but it can be recovered on liquidated demands, as an account stated.¹⁶² Interest will be awarded upon money fraudulently detained.¹⁶³

¹⁵¹ Norton v. Babcock, 2 Metc. Mass. 510; Sterling v. Peet, 14 Conn. 245; Keeler v. Wood, 30 Vt. 242; Hardy v. Nelson, 27 Me. 525; Ex'rs of Guerard v. Rivers, 1 Bay, So. C. 265.

¹⁵² Kinney v. Watts, 14 Wend. N. Y. 38; Foster v. Thompson, 41 N. H. 373; Threlkeld v. Fitzhugh, 2 Leigh, Va. 451; Cox's Heirs v. Strode, 2 Bibb, Ky. 273; Wade v. Comstock, 11 Ohio St. 71; Hall v. York, 22 Tex. 641; Brandt v. Foster, 5 Iowa, 287; McClure v. Gamble, 27 Penn. St. 288; Martin v. Gordon, 24 Ga. 533; Tony v. Matthews, 23 Mo. 437.

¹⁵³ Shaw v. Wilkins, 8 Humphr. Tenn. 647.

¹⁵⁴ For a full consideration of this subject, consult Sedgwick, Dam. chap. 6; 2 Washburn, Real Prop. 676; 1 Rawle, Cov. 314.

¹⁵⁵ Lewis v. Lee, 15 Ind. 499; Heyman v. Landers, 15 Cal. 107.

¹⁵⁶ White v. Tompkins, 52 Penn. St. 363; Bush v. Holmes, 53 Me. 417; Bartlett v. Blanchard, 13 Gray, Mass. 429; Zehner v. Dale, 25 Ind. 433.

¹⁵⁷ Maher v. Riley, 17 Cal. 415; Calvit v. McFadden, 13 Tex. 324.

¹⁵⁸ Worthen v. Wilmot, 30 Vt. 555; Jackson R. R. v. Moore, 40 Miss. 39.

¹⁵⁹ Spring v. Haskell, 4 All. Mass. 112; Perkins v. Portland R. R. 47 Me. 573.

¹⁶⁰ Michigan R. R. v. Caster, 13 Ind. 164; Taylor v. Collier, 26 Ga. 122.

¹⁶¹ Goff v. Rehoboth, 2 Cush. Mass. 475; Aldrich v. Dunham, 16 Ill. 403.

¹⁶² Hollingsworth v. Hammond, 30 Ala. N. S. 668.

¹⁶³ Parker v. Bigelow, 14 Pick. Mass. 436; Crane v. Thayer, 18 Vt. 162.

In all cases simple interest is to be given; compound interest is never allowed.

656. The action for breach of promise of marriage is an action sounding in contract, but the measure of damages is very different from any other contract. The general idea is compensation, but as damage to feelings is to be estimated, the jury have great liberty in assessing damage within very wide limits. The jury may consider the pecuniary value of the marriage, the higher station in life that would be gained thereby, and the injury to the feelings, affections, and wounded pride.¹⁶⁴ When the defendant has seduced the plaintiff by means of the promise, this may be shown in aggravation of damages.¹⁶⁵

657. In all cases the law considers only the immediate consequences of the breach of a contract; it may entail on the plaintiff remote damages of far greater amount, but of these the law takes no account. Under this principle the plaintiff is not allowed to recover any contingent profits which he might have realized had the contract been performed.

658. *Construction* has been briefly defined to be the art to discover the thoughts which are expressed in words or writings; or it is the most probable explanation of what appears obscure or ambiguous.¹⁶⁶

659. Several causes force us to have recourse to construction, or, as the civilians call it, interpretation: 1, the imperfection of language, and the ignorance or neglect of persons who write agreements, which is unhappily an inexhaustible source of obscurity and ambiguity, of which men sometimes unjustly, but at other times rightly, take advantage; 2, agreements do not bind merely by what they contain, but they are to be accompanied by the equity, and the usage or the law which relate to them. We shall consider, therefore, first, the ambiguities in agreements themselves, whether verbal or written; and second, the interpretation, which consists in giving to obligations the necessary consequences of agreements, although they be not expressed.

660. The doctrine of interpretation or construction belongs properly to logic, which teaches us how to direct our minds in search of truth. The rules of construction are in fact the means offered to discover the true sense of agreements, which are either obscure or ambiguous. These rules are the fruits of the experience of ages; they are remarkably clear in the Roman law, and from this source all other systems have drawn.¹⁶⁷

661. In considering the subject of the construction of laws, many of the rules which apply to contracts, and wills or testaments, are to be found. Under the present head will be examined the rules which relate to contracts generally, and to wills.

1st Rule. When a construction is to be put on a writing, it is to bear that which the words in their literal and natural meaning signify, and, if that be clear of doubt, no other construction can be given.¹⁶⁸

2d Rule. As agreements are to be formed by the mutual consent of the contracting parties, each one is bound to explain himself clearly—one what he asks,

¹⁶⁴ *Tobin v. Shaw*, 45 Me. 348; *Berry v. Dacosta*, 1 Law Rep. C. B. 331.

¹⁶⁵ *Kniffen v. McConnell*, 30 N. Y. 285; *Burnett v. Simpkins*, 24 Ill. 264.

¹⁶⁶ 1 Powell, Contr. 370. Lieber, in his *Legal and Political Hermeneutics*, distinguishes between interpretation and construction, considering the former as limited to the written text, while construction goes beyond and includes cases where texts are to be reconciled with rules of law or with compacts or constitutions of superior authority, or where we reason from the aim or object of an instrument or determine its application to cases unprovided for. C. 1, § 8; c. 3, § 2; c. 4; c. 5.

¹⁶⁷ The rules of the civil law are contained in one book of the Pandects. Dig. 50, 17.

¹⁶⁸ *Hawes v. Smith*, 12 Me. 429.

the other what he promises. It is then, by discovering their common intention, that what is obscure and ambiguous in the agreement is to be explained.¹⁶⁹

3d Rule. The common intention of the parties, what both understood, is to be preferred to the grammatical sense of the terms. It is a maxim of law that *mala grammatica non vitiat chartam*.¹⁷⁰

4th Rule. When a clause is capable of two significations, it should be understood in that in which it will have some operation, rather than in another in which it will have none.¹⁷¹

5th Rule. One clause in an agreement ought to be so construed with other clauses that the whole may stand if possible. And when several instruments in writing are made at the same time, between the same parties, relating to the same subjects, they constitute but one agreement; and the court will presume they were executed in the order best calculated to effect the intent of the parties.¹⁷²

6th Rule. When words taken literally lead to a manifest absurdity, they will be construed if possible to avoid it. For example: when words are manifestly inconsistent with the declared purpose and object of the contract, they will be rejected; as, if, in a contract of sale, the price of the thing should be admitted to have been received, and the seller should promise not to deliver the commodity.¹⁷³ When words are omitted so as to defeat the effect of the contract, they will be supplied by the obvious sense and inference of the context; as, if the contract stated that the seller had promised to sell to the buyer a horse, for the consideration of one hundred dollars, and for the purpose of completing the contract the seller had delivered the horse to the buyer, and the buyer promised to pay him "one hundred for the same," the word dollars would be supplied.¹⁷⁴

7th Rule. When a peculiar meaning has been stamped upon words by the usage of a particular trade or a particular place, in which the contract is made, such technical and peculiar meaning will prevail.¹⁷⁵

8th Rule. However general the terms in which an agreement is conceived may be, it comprises only those things respecting which it appears that the contracting parties proposed to contract, and not others of which they never thought. *Sensus verborum ex causa dicentis accipiendus est, et secundum subjectam materiam*.¹⁷⁶

¹⁶⁹ The intention of the parties is always to be regarded as far as the rules of law will permit. *Verba intentioni, non e contra, debent inservire*. In many cases where there is a latent ambiguity in the contract it is necessary to resort to extrinsic evidence to discover the intention of the parties. *Merrill v. Gore*, 29 Me. 346; *Varnum v. Thruston*, 17 Md. 470; *Stewart v. Lang*, 37 Penn. St. 201; *Swisher v. Grumbles*, 18 Tex. 164; *Murray v. Carrothers*, 1 Metc. Ky. 71.

¹⁷⁰ *Coke*, Litt. 223. The meaning of words is acquired by usage, not from grammarians, and no power but the legislative can alter the common meaning. But this common meaning cannot usually be defined with accuracy, and it must therefore be shown by the intentions of the parties which of several meanings they have given to the words.

¹⁷¹ *Archibald v. Thomas*, 3 Cow. N. Y. 284.

¹⁷² *Newall v. Wright*, 3 Mass. 138; *Hunt v. Livermore*, 5 Pick. Mass. 395; *Rogers v. Kneeland*, 13 Wend. N. Y. 114; *Hill v. Huntress*, 43 N. H. 480; *Norton v. Kearney*, 10 Wisc. 443.

¹⁷³ *Simpson v. Vaughan*, 2 Atk. Ch. 32.

¹⁷⁴ *Booth v. Wallace*, 2 Root, Conn. 247. See *Boyd v. Brotherson*, 10 Wend. N. Y. 93; *Conner v. Routh*, 8 Miss. 176; *Finley v. Acock*, 9 Miss. 841.

¹⁷⁵ *Ellmaker v. Ellmaker*, 4 Watts, Penn. 89; 4 East, 135; 7 Taunt. 272; *Bridge v. Wain*, 1 Stark, 504; *Mills v. Bank of U. S.* 11 Wheat. 431.

This rule is especially applicable to contracts of insurance, which contain many loose and indeterminate words and phrases. But by mercantile usage, as well as by a long course of judicial decisions, these words have acquired a definite and a peculiar meaning. *Seecomb v. Provincial Ins. Co.* 10 All. Mass. 305.

¹⁷⁶ 4 *Coke*, Litt. 14; *Williamson v. McClure*, 37 Penn. St. 402; *Tracy v. Chicago*, 24 Ill. 500; *Warren v. Merrifield*, 8 Metc. Mass. 93.

Under this rule we may class many cases where general words are restrained by the subject matter. Thus a release reciting a particular class of demands will only apply to those, although it may in its terms include "all demands whatsoever," for this general clause is only intended to remedy accidental omissions, and not to extend the contract.¹⁷⁷

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¹⁷⁷ *Lyman v. Clarke*, 9 Mass. 235; *Munro v. Alaire*, 2 Caines, N. Y. 329; *United States v. Kirkpatrick*, 9 Wheat. 720; 2 Rolle, Abr. 409.

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¹⁸⁴ 2 Sharswood, Blackst. Comm. 381; Dig. 50, 17, 12.

¹⁸⁵ Smith v. Bell, 6 Pet. 68; Richardson v. Noyes, 2 Mass. 56; Ingliss v. Trustees, 3 Pet. 113.

One leading principle in regard to wills is that the same technical words are not required as in conveyances. Thus the word "heirs" is not necessary to a devise of a fee simple. It has been held that, however technical the words, the clear intent of the testator will prevail over their legal operation; Lasher v. Lasher, 13 Barb. N. Y. 106; or will show that they are used in another sense. Robertson v. Johnston, 24 Ga. 102; Thrasher v. Ingram, 32 Ala. 645.

¹⁸⁶ See Guier v. Page, 4 Serg. & R. Penn. 1; 20 Wend. N. Y. 431; 2 Campb. 532.

¹⁸⁷ Dig. 50, 17, 34.

the true meaning of particular words in an instrument when these words have various senses.¹⁸⁸ But usage is never admitted to contradict or substantially vary an agreement or its legal import.¹⁸⁹

Parties contracting are understood to use the terms employed in the usual manner in the place of the contract, among persons of the same character or occupation, and according to the usage of the trade governing the subject matter. But they must know the usage either expressly or impliedly. Persons in the same trade are assumed to be acquainted with the usages of that trade. But when the subject matter of the contract lies out of the business of one party, he must be shown to know and to assent to the usage.¹⁹⁰ When adopted by both, it becomes a part of the contract as much as if so expressed in terms.

667. The *law* is a supplement to many contracts, when they have not been made in violation of its precepts. The implied warranty of title in case of eviction is only a natural consequence of the contract of sale of personal estate, when nothing has been expressly provided on the subject.¹⁹¹

668. In general, the validity of a contract depends upon the law of the place where it has been made; if valid there, it is valid, in general, everywhere; and *vice versa*, if void or illegal there, it is in general void everywhere.¹⁹² To this rule there are some exceptions: A contract in violation of our laws or the laws of God will not be enforced here.¹⁹³ One nation will not regard or enforce the revenue laws of another.¹⁹⁴

669. When the contract is entered into in one place to be executed in another, the first place is the *locus celebrati contractus*, the other the *locus solutionis*. In such cases generally the parties are presumed to have in view the laws of the place of execution, and these laws will govern the validity, construction, and performance of the contract.¹⁹⁵ This is because the latter is regarded as the *locus contractus*, but the intentions of the parties and the facts may cause the place of making the contract to be so regarded, in which case its laws will govern the construction.¹⁹⁶

670. The force of obligations arises from the consent of the parties to the contract. It is therefore evident that they can have no effect except between the contracting parties, and that they cannot be lawfully injurious to third persons who had no power to act in relation to them.

But contracts are too often infected with frauds prejudicial to the creditors of one of the contracting parties. These frauds are contrary to the good faith which is required in all agreements, and it is not limited to the contracting parties. Good faith, fairness, and honesty are equally due to all persons who are interested in that which passes between the contracting parties. This is what results from the sublime gospel morality, of which the law for the most

¹⁸⁸ The Reeside, 2 Sumn. C. C. 569; Stultz v. Dickey, 5 Binn. Penn. 287; Ludwicks v. Ohio Ins. Co., 5 Ohio, 436; United States v. Arredondo, 6 Pet. 715.

¹⁸⁹ Renner v. Bank of Columbia, 9 Wheat. 581.

¹⁹⁰ City Bank v. Cutter, 3 Pick. Mass. 414; Bank of Washington v. Triplett, 1 Pet. 25.

¹⁹¹ Reed v. Barber, 3 Cow. N. Y. 272; Colcock v. Reid, 8 M'Cord, So. C. 513; Dorsey v. Jackman, 1 Serg. & R. Penn. 42.

¹⁹² Story, Conf. of L. §§ 242, 243; Bank of U. S. v. Donnally, 8 Pet. 361; Sessions v. Little, 9 N. H. 271; Dunscomb v. Bunker, 2 Mete. Mass. 8.

¹⁹³ Forbes v. Cochrane, 2 Barnw. & C. 443, 471.

¹⁹⁴ Boucher v. Lawson, Cas. Temp. Hardw. 85, 89, 194.

¹⁹⁵ Andrews v. Pond, 13 Pet. 65; Bell v. Bruen, 1 How. 182; Cox v. United States, 6 Pet. 172; Fanning v. Consequa, 17 Johns. N. Y. 511; Denny v. Williams, 5 All. Mass. 1; Butler v. Myer, 17 Ind. 77; Blodgett v. Durgin, 32 Vt. 361.

¹⁹⁶ Boyd v. Ellis, 11 Iowa, 97; Newman v. Kershaw, 10 Wisc. 333; Brown v. Freeland, 34 Miss. 181.

part only develops its consequences; "all things whatsoever ye would that men should do unto you, do ye even so to them."¹⁹⁷

671. Fraud avoids a contract, *ab initio*, both at law and in equity, when its object has been to cheat third persons, as well as when one of the parties has cheated the other.¹⁹⁸ This is an actual or *positive* fraud.

672. A *constructive* fraud is an act which, though not intended as a fraud, yet because of its tendency to mislead or deceive has all the mischievous effects of a fraud. Constructive frauds are such as are either against public policy, in violation of some special confidence or trust, or operate substantially as a fraud upon private rights, duties, or intentions of third persons.¹⁹⁹

673. Several statutes were passed in England, copied indeed from the Roman law,²⁰⁰ to prevent frauds to third persons. The principles of the statutes, though they may not have been substantially enacted in the United States, prevail generally throughout the Union.²⁰¹

By the statute of 3 Henry VII, c. 4, all gifts of goods and chattels in trust for the donor were declared void; and by the statute of 13 Eliz. c. 5, gifts of goods and chattels, as well as land, by writing or otherwise, made with intent to delay, hinder or defeat creditors, were rendered void as against the persons to whom such frauds would be prejudicial; provided that the provisions of this statute shall not extend to *bona fide* purchasers.

Soon after the passage of this statute a case arose,²⁰² in which the court said that the following circumstances were badges of fraud:

1. The gift of a man's property in general, without exception of the donor's apparel, of anything of necessity.

2. The fact that the donor continued in possession, and used the goods as his own; and by means thereof traded with others, and defrauded and deceived them.

3. It was made in secret.

4. It was made pending the writ.

5. There was a trust between the parties; for the donor possessed all, and used them as his proper goods; and fraud is always appareled and clad with a trust.

6. The deed expresses that the gift was made honestly, truly, and *bona fide*; *et clausula inconsueta semper inducunt suspicionem*.

In general, these badges of fraud are so considered in the United States, but they are sometimes viewed as *prima facie* evidence only, and it depends upon circumstances how far they operate.²⁰³ Again, the re-enactment of the princi-

¹⁹⁷ Matthew, vii. 12.

¹⁹⁸ Fonblanque, Eq. 3d ed. 66, note, 6th ed. 122; Newland, Contr. 352.

¹⁹⁹ Story, Eq. Jur. §§ 258 to 240.

²⁰⁰ Dig. 42, 8, 5, 11; 2 Bell, Comm. 182.
²⁰¹ Reade v. Livingston, 3 Johns. Ch. N. Y. 481; 8 Wheat. 229; Den v. De Hart, 1 Halst. N. J. 450; Bacon, Abr. *Fraud*, C. Bouvier, ed.

²⁰² Twyne's Case, 3 Coke, 81; S. C. under the name of Chamberlayne v. Twyne, F. Moore, 638.

²⁰³ It is generally held that these statutes, as well as the 27 Eliz. c. 4, being enacted before the emigration to this country, form a part of the common law which is in force here, unless altered by statute. Conard v. Atlantic Ins. Co., 1 Pet. 449; Bissell v. Hopkins, 3 Cow. N. Y. 189; Meeker v. Wilson, 1 Gall. C. C. 419; Clow v. Woods, 4 Serg. & R. Penn. 285; Young v. McClure, 2 Watts & S. Penn. 147; Welsh v. Hayden, 1 Penn. 57; Cowden v. Brady, 8 Serg. & R. Penn. 510; Sterling v. Vancleve, 7 Halst. N. J. 285; Adams v. Wheeler, 10 Pick. Mass. 199; Ulmer v. Hills, 8 Me. 326. Lord Coke considers the statute of 13 Eliz. as declaratory of the common law; Coke, Litt. 76 a, 290 b; and Lord Mansfield says that the rules of the common law were as strong against fraud as the statutes; Cadogan v. Kennett, Cowp. Ch. 434. See also Hamilton v. Russel, 1 Cranch, 316.

The rule under these statutes does not go to the extent of holding every voluntary conveyance fraudulent as to existing debts, however small the amount. Such strictness as this would prevent all gifts. The fact that debts exist at the time is at the most only pre-

In all cases simple interest is to be given ; compound interest is never allowed.

656. The action for breach of promise of marriage is an action sounding in contract, but the measure of damages is very different from any other contract. The general idea is compensation, but as damage to feelings is to be estimated, the jury have great liberty in assessing damage within very wide limits. The jury may consider the pecuniary value of the marriage, the higher station in life that would be gained thereby, and the injury to the feelings, affections, and wounded pride.¹⁶⁴ When the defendant has seduced the plaintiff by means of the promise, this may be shown in aggravation of damages.¹⁶⁵

657. In all cases the law considers only the immediate consequences of the breach of a contract ; it may entail on the plaintiff remote damages of far greater amount, but of these the law takes no account. Under this principle the plaintiff is not allowed to recover any contingent profits which he might have realized had the contract been performed.

658. *Construction* has been briefly defined to be the art to discover the thoughts which are expressed in words or writings ; or it is the most probable explanation of what appears obscure or ambiguous.¹⁶⁶

659. Several causes force us to have recourse to construction, or, as the civilians call it, interpretation: 1, the imperfection of language, and the ignorance or neglect of persons who write agreements, which is unhappily an inexhaustible source of obscurity and ambiguity, of which men sometimes unjustly, but at other times rightly, take advantage ; 2, agreements do not bind merely by what they contain, but they are to be accompanied by the equity, and the usage or the law which relate to them. We shall consider, therefore, first, the ambiguities in agreements themselves, whether verbal or written ; and second, the interpretation, which consists in giving to obligations the necessary consequences of agreements, although they be not expressed.

660. The doctrine of interpretation or construction belongs properly to logic, which teaches us how to direct our minds in search of truth. The rules of construction are in fact the means offered to discover the true sense of agreements, which are either obscure or ambiguous. These rules are the fruits of the experience of ages ; they are remarkably clear in the Roman law, and from this source all other systems have drawn.¹⁶⁷

661. In considering the subject of the construction of laws, many of the rules which apply to contracts, and wills or testaments, are to be found. Under the present head will be examined the rules which relate to contracts generally, and to wills.

1st Rule. When a construction is to be put on a writing, it is to bear that which the words in their literal and natural meaning signify, and, if that be clear of doubt, no other construction can be given.¹⁶⁸

2d Rule. As agreements are to be formed by the mutual consent of the contracting parties, each one is bound to explain himself clearly—one what he asks,

¹⁶⁴ *Tobin v. Shaw*, 45 Me. 348 ; *Berry v. Dacosta*, 1 Law Rep. C. B. 331.

¹⁶⁵ *Kniffen v. McConnell*, 30 N. Y. 285 ; *Burnett v. Simpkins*, 24 Ill. 264.

¹⁶⁶ 1 Powell, Contr. 370. Lieber, in his *Legal and Political Hermeneutics*, distinguishes between interpretation and construction, considering the former as limited to the written text, while construction goes beyond and includes cases where texts are to be reconciled with rules of law or with compacts or constitutions of superior authority, or where we reason from the aim or object of an instrument or determine its application to cases unprovided for. C. 1, § 8 ; c. 3, § 2 ; c. 4 ; c. 5.

¹⁶⁷ The rules of the civil law are contained in one book of the Pandects. Dig. 50, 17.

¹⁶⁸ *Hawes v. Smith*, 12 Me. 429.

the other what he promises. It is then, by discovering their common intention, that what is obscure and ambiguous in the agreement is to be explained.¹⁶⁹

3d Rule. The common intention of the parties, what both understood, is to be preferred to the grammatical sense of the terms. It is a maxim of law that *mala grammatica non vitiat chartam*.¹⁷⁰

4th Rule. When a clause is capable of two significations, it should be understood in that in which it will have some operation, rather than in another in which it will have none.¹⁷¹

5th Rule. One clause in an agreement ought to be so construed with other clauses that the whole may stand if possible. And when several instruments in writing are made at the same time, between the same parties, relating to the same subjects, they constitute but one agreement; and the court will presume they were executed in the order best calculated to effect the intent of the parties.¹⁷²

6th Rule. When words taken literally lead to a manifest absurdity, they will be construed if possible to avoid it. For example: when words are manifestly inconsistent with the declared purpose and object of the contract, they will be rejected; as, if, in a contract of sale, the price of the thing should be admitted to have been received, and the seller should promise not to deliver the commodity.¹⁷³ When words are omitted so as to defeat the effect of the contract, they will be supplied by the obvious sense and inference of the context; as, if the contract stated that the seller had promised to sell to the buyer a horse, for the consideration of one hundred dollars, and for the purpose of completing the contract the seller had delivered the horse to the buyer, and the buyer promised to pay him "one hundred for the same," the word dollars would be supplied.¹⁷⁴

7th Rule. When a peculiar meaning has been stamped upon words by the usage of a particular trade or a particular place, in which the contract is made, such technical and peculiar meaning will prevail.¹⁷⁵

8th Rule. However general the terms in which an agreement is conceived may be, it comprises only those things respecting which it appears that the contracting parties proposed to contract, and not others of which they never thought. *Sensus verborum ex causa dicentis accipiendus est, et secundum subjectam materiam*.¹⁷⁶

¹⁶⁹ The intention of the parties is always to be regarded as far as the rules of law will permit. *Verba intentioni, non e contra, debent inservire*. In many cases where there is a latent ambiguity in the contract it is necessary to resort to extrinsic evidence to discover the intention of the parties. *Merrill v. Gore*, 29 Me. 346; *Varnum v. Thruston*, 17 Md. 470; *Stewart v. Lang*, 37 Penn. St. 201; *Swisher v. Grumbles*, 18 Tex. 164; *Murray v. Carrothers*, 1 Metc. Ky. 71.

¹⁷⁰ *Coke*, Litt. 223. The meaning of words is acquired by usage, not from grammarians, and no power but the legislative can alter the common meaning. But this common meaning cannot usually be defined with accuracy, and it must therefore be shown by the intentions of the parties which of several meanings they have given to the words.

¹⁷¹ *Archibald v. Thomas*, 3 Cow. N. Y. 284.

¹⁷² *Newall v. Wright*, 3 Mass. 138; *Hunt v. Livermore*, 5 Pick. Mass. 395; *Rogers v. Kneeland*, 13 Wend. N. Y. 114; *Hill v. Huntress*, 43 N. H. 480; *Norton v. Kearney*, 10 Wisc. 443.

¹⁷³ *Simpson v. Vaughan*, 2 Atk. Ch. 32.

¹⁷⁴ *Booth v. Wallace*, 2 Root, Conn. 247. See *Boyd v. Brotherson*, 10 Wend. N. Y. 93; *Conner v. Routh*, 8 Miss. 176; *Finley v. Acock*, 9 Miss. 841.

¹⁷⁵ *Ellmaker v. Ellmaker*, 4 Watts, Penn. 89; 4 East, 135; 7 Taunt. 272; *Bridge v. Wain*, 1 Stark, 504; *Mills v. Bank of U. S.* 11 Wheat. 431.

This rule is especially applicable to contracts of insurance, which contain many loose and indeterminate words and phrases. But by mercantile usage, as well as by a long course of judicial decisions, these words have acquired a definite and a peculiar meaning. *Secomb v. Provincial Ins. Co.* 10 All. Mass. 305.

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666. When a *usage* is fully established it is the law of the trade, and the presumption is that the parties intended to conform to it when they have been silent on the subject.¹⁸⁷ Its office is to interpret the otherwise indeterminate intentions of the parties, and to ascertain the nature and extent of their contracts, arising not from express stipulations, but from mere implications and presumptions and of acts of doubtful and equivocal character, or to ascertain

¹⁸⁴ 2 Sharswood, Blackst. Comm. 381; Dig. 50, 17, 12.

¹⁸⁵ Smith v. Bell, 6 Pet. 68; Richardson v. Noyes, 2 Mass. 56; Ingliss v. Trustees, 3 Pet. 113.

One leading principle in regard to wills is that the same technical words are not required as in conveyances. Thus the word "heirs" is not necessary to a devise of a fee simple. It has been held that, however technical the words, the clear intent of the testator will prevail over their legal operation; Lasher v. Lasher, 13 Barb. N. Y. 106; or will show that they are used in another sense. Robertson v. Johnston, 24 Ga. 102; Thrasher v. Ingram, 32 Ala. 645.

¹⁸⁶ See Guier v. Page, 4 Serg. & R. Penn. 1; 20 Wend. N. Y. 431; 2 Campb. 532.

¹⁸⁷ Dig. 50, 17, 34.

the true meaning of particular words in an instrument when these words have various senses.¹⁸⁸ But usage is never admitted to contradict or substantially vary an agreement or its legal import.¹⁸⁹

Parties contracting are understood to use the terms employed in the usual manner in the place of the contract, among persons of the same character or occupation, and according to the usage of the trade governing the subject matter. But they must know the usage either expressly or impliedly. Persons in the same trade are assumed to be acquainted with the usages of that trade. But when the subject matter of the contract lies out of the business of one party, he must be shown to know and to assent to the usage.¹⁹⁰ When adopted by both, it becomes a part of the contract as much as if so expressed in terms.

667. The law is a supplement to many contracts, when they have not been made in violation of its precepts. The implied warranty of title in case of eviction is only a natural consequence of the contract of sale of personal estate, when nothing has been expressly provided on the subject.¹⁹¹

668. In general, the validity of a contract depends upon the law of the place where it has been made; if valid there, it is valid, in general, everywhere; and *vice versa*, if void or illegal there, it is in general void everywhere.¹⁹² To this rule there are some exceptions: A contract in violation of our laws or the laws of God will not be enforced here.¹⁹³ One nation will not regard or enforce the revenue laws of another.¹⁹⁴

669. When the contract is entered into in one place to be executed in another, the first place is the *locus celebrati contractus*, the other the *locus solutionis*. In such cases generally the parties are presumed to have in view the laws of the place of execution, and these laws will govern the validity, construction, and performance of the contract.¹⁹⁵ This is because the latter is regarded as the *locus contractus*, but the intentions of the parties and the facts may cause the place of making the contract to be so regarded, in which case its laws will govern the construction.¹⁹⁶

670. The force of obligations arises from the consent of the parties to the contract. It is therefore evident that they can have no effect except between the contracting parties, and that they cannot be lawfully injurious to third persons who had no power to act in relation to them.

But contracts are too often infected with frauds prejudicial to the creditors of one of the contracting parties. These frauds are contrary to the good faith which is required in all agreements, and it is not limited to the contracting parties. Good faith, fairness, and honesty are equally due to all persons who are interested in that which passes between the contracting parties. This is what results from the sublime gospel morality, of which the law for the most

¹⁸⁸ The Reeside, 2 Sumn. C. C. 569; Stultz v. Dickey, 5 Binn. Penn. 287; Ludwicks v. Ohio Ins. Co., 5 Ohio, 436; United States v. Arredondo, 6 Pet. 715.

¹⁸⁹ Renner v. Bank of Columbia, 9 Wheat. 581.

¹⁹⁰ City Bank v. Cutter, 3 Pick. Mass. 414; Bank of Washington v. Triplett, 1 Pet. 25.

¹⁹¹ Reed v. Barber, 3 Cow. N. Y. 272; Colcock v. Reid, 8 M'Cord, So. C. 513; Dorsey v. Jackman, 1 Serg. & R. Penn. 42.

¹⁹² Story, Conf. of L. §§ 242, 243; Bank of U. S. v. Donnelly, 8 Pet. 361; Sessions v. Little, 9 N. H. 271; Dunscomb v. Bunker, 2 Mete. Mass. 8.

¹⁹³ Forbes v. Cochrane, 2 Barnw. & C. 448, 471.

¹⁹⁴ Boucher v. Lawson, Cas. Temp. Hardw. 85, 89, 194.

¹⁹⁵ Andrews v. Pond, 13 Pet. 65; Bell v. Bruen, 1 How. 182; Cox v. United States, 6 Pet. 172; Fanning v. Consequa, 17 Johns. N. Y. 511; Denny v. Williams, 5 All. Mass. 1; Butler v. Myer, 17 Ind. 77; Blodgett v. Durgin, 32 Vt. 361.

¹⁹⁶ Boyd v. Ellis, 11 Iowa, 97; Newman v. Kershaw, 10 Wisc. 333; Brown v. Freeland, 34 Miss. 181.

part only develops its consequences; "all things whatsoever ye would that men should do unto you, do ye even so to them."¹⁹⁷

671. Fraud avoids a contract, *ab initio*, both at law and in equity, when its object has been to cheat third persons, as well as when one of the parties has cheated the other.¹⁹⁸ This is an actual or *positive* fraud.

672. A *constructive* fraud is an act which, though not intended as a fraud, yet because of its tendency to mislead or deceive has all the mischievous effects of a fraud. Constructive frauds are such as are either against public policy, in violation of some special confidence or trust, or operate substantially as a fraud upon private rights, duties, or intentions of third persons.¹⁹⁹

673. Several statutes were passed in England, copied indeed from the Roman law,²⁰⁰ to prevent frauds to third persons. The principles of the statutes, though they may not have been substantially enacted in the United States, prevail generally throughout the Union.²⁰¹

By the statute of 3 Henry VII, c. 4, all gifts of goods and chattels in trust for the donor were declared void; and by the statute of 13 Eliz. c. 5, gifts of goods and chattels, as well as land, by writing or otherwise, made with intent to delay, hinder or defeat creditors, were rendered void as against the persons to whom such frauds would be prejudicial; provided that the provisions of this statute shall not extend to *bona fide* purchasers.

Soon after the passage of this statute a case arose,²⁰² in which the court said that the following circumstances were badges of fraud:

1. The gift of a man's property in general, without exception of the donor's apparel, of anything of necessity.

2. The fact that the donor continued in possession, and used the goods as his own; and by means thereof traded with others, and defrauded and deceived them.

3. It was made in secret.

4. It was made pending the writ.

5. There was a trust between the parties; for the donor possessed all, and used them as his proper goods; and fraud is always appareled and clad with a trust.

6. The deed expresses that the gift was made honestly, truly, and *bona fide*; *et clausula inconsueta semper inducunt suspicionem*.

In general, these badges of fraud are so considered in the United States, but they are sometimes viewed as *prima facie* evidence only, and it depends upon circumstances how far they operate.²⁰³ Again, the re-enactment of the princi-

¹⁹⁷ Matthew, vii. 12.

¹⁹⁸ Fonblanque, Eq. 3d ed. 66, note, 6th ed. 122; Newland, Contr. 352.

¹⁹⁹ Story, Eq. Jur. §§ 258 to 240.

²⁰⁰ Dig. 42, 8, 5, 11; 2 Bell, Comm. 182.

²⁰¹ Reade v. Livingston, 3 Johns. Ch. N. Y. 481; 8 Wheat. 229; Den v. De Hart, 1 Halst. N. J. 450; Bacon, Abr. *Fraud*, C. Bouvier, ed.

²⁰² Twyne's Case, 3 Coke, 81; S. C. under the name of Chamberlayne v. Twyne, F. Moore, 638.

²⁰³ It is generally held that these statutes, as well as the 27 Eliz. c. 4, being enacted before the emigration to this country, form a part of the common law which is in force here, unless altered by statute. Conard v. Atlantic Ins. Co., 1 Pet. 449; Bissell v. Hopkins, 3 Cow. N. Y. 189; Meeker v. Wilson, 1 Gall. C. C. 419; Clow v. Woods, 4 Serg. & R. Penn. 285; Young v. McClure, 2 Watts & S. Penn. 147; Welsh v. Hayden, 1 Penn. 57; Cowden v. Brady, 8 Serg. & R. Penn. 510; Sterling v. Vancleve, 7 Halst. N. J. 285; Adams v. Wheeler, 10 Pick. Mass. 199; Ulmer v. Hills, 8 Me. 326. Lord Coke considers the statute of 13 Eliz. as declaratory of the common law; Coke, Litt. 76 a, 290 b; and Lord Mansfield says that the rules of the common law were as strong against fraud as the statutes; Cadogan v. Kennett, Cowp. Ch. 434. See also Hamilton v. Russel, 1 Cranch, 316.

The rule under these statutes does not go to the extent of holding every voluntary conveyance fraudulent as to existing debts, however small the amount. Such strictness as this would prevent all gifts. The fact that debts exist at the time is at the most only pre-

ples of these statutes varies in the several states, so that there must of course be a difference in the decisions of the different states.

By the 27 Eliz. c. 4, it is enacted that all conveyances, grants, charges, leases, estates, encumbrances and limitation of uses of, in, or out of any lands, tenements or hereditaments, made with intent to defraud such persons as have purchased or shall purchase in fee simple, etc., the same lands, etc., shall be null and void.

Whenever a voluntary conveyance is made, a presumption of fraud properly arises upon this statute, which presumption may be repelled by showing that the transaction on which the conveyance was founded virtually contained some conventional stipulations, some compromise of interests or reciprocity of benefits, that point out an object and motive beyond the indulgence of affection or claims of kindred, and not reconcilable with the supposition of an intent to deceive a purchaser. But, unless so repelled, such a conveyance, coupled with a negotiation for sale, is conclusive evidence of statutory fraud.

sumptive evidence of fraud, and the jury are to consider the amount of the debts, and the circumstances of the debtor at the time, as establishing the fact of fraud or not. *Brackett v. Waite*, 4 Vt. 389; *Bank of U. S. v. Housman*, 6 Paige, Ch. N. Y. 526; *Hawkins v. Moffitt*, 10 B. Monr. Ky. 81; *Gannard v. Eslava*, 20 Ala. 732; *Clark v. Defew*, 25 Penn. St. 509; *Williams v. Banks*, 11 Md. 198; *Pomeroy v. Bailey*, 43 N. H. 118; *Nelson v. Smith*, 28 Ill. 495.

And it is to be noticed that gratuitous contracts fraudulent as to creditors may still be good between the parties, the creditors alone being entitled to take advantage of the fraud. *Gridley v. Wymant*, 23 How. 500; *Robinson v. Stewart*, 10 N. Y. 189; *Newell v. Newell*, 34 Miss. 385; *Fargo v. Ladd*, 6 Wisc. 106; *Schettler v. Brunettes*, 7 Wisc. 197.

CHAPTER IV.

THE DIFFERENT KINDS OF CONTRACTS.

- 674. General principles of classification.
- 681-686. Joint and several contracts.
 - 682. Promise made to several persons.
 - 683. Promise made by several persons.
 - 687. Conjunctive and disjunctive agreements.
 - 694. Divisible and indivisible agreements.
 - 699. Dependent and independent agreements.
 - 702. Principal and accessory agreements.
 - 705. Certain and hazardous agreements.
- 708-716. Onerous and gratuitous contracts.
 - 708. Onerous contracts.
 - 709-716. Gratuitous contracts.
- 710-715. Gifts.
 - 712. Gifts *inter vivos*.
 - 713. *Donatio mortis causæ*.
 - 716. Suretyship.
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 - 726. Performance before expiration of term.
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- 730-761. Conditional and unconditional contracts.
- 737-755. Kinds of conditions.
 - 738. Express or implied conditions.
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 - 744. Possible and impossible conditions.
 - 748. Copulative and disjunctive conditions.
 - 750. Positive and negative conditions.
 - 752. Consistent and repugnant conditions.
 - 754. Resolutive and suspensive conditions.
- 756-759. Effect of the condition.
 - 757. Effect of condition while depending.
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- 769-783. Illegal and fraudulent agreements.
- 770-784. Contracts void at common law.
 - 771. Immoral contracts.
 - 773. Contracts in violation of public policy.
- 781-783. Fraudulent contracts.
 - 782. Misrepresentation.
 - 783. Concealment.
 - 784. Fraud upon third persons.
- 785. Contracts void by statute.

674. The several kinds or classes into which agreements may be arranged for the purpose of aiding the memory and of considering the principles by which they are governed, may be multiplied almost to infinity, if we consider the different things which may be the objects of contracts, the clauses which the contracting parties may add to them and which change their nature, the rights and duties which result from them, the condition of the persons who contract, whether they be *sui juris* or not, and the manner of executing or causing them to be executed. But multiplying the classes without need would be adding obscurity to a subject which requires to be made clear.

675. Before proceeding to the consideration of the several kinds of contracts, it is proper to notice that in general they are divided into three principal classes: contracts of record, such as judgments, recognizances, and statutes staple; specialties, or contracts under seal, such as bonds and deeds; simple contracts, or contracts by parol. All contracts not of record nor under seal are considered as simple or parol contracts, whether they be in writing or not in writing.¹

676. A judgment is the decision or sentence of the law given by a court of justice or other competent tribunal, as the result of proceedings instituted therein. The law presumes that every man has undertaken to be bound by a judgment against him.

677. A recognizance is an obligation of record entered into before a court or officer duly authorized for that purpose, with a condition to do some act required by law which is therein specified.

678. Statutes, both statute staple and statute merchant, are forms of contracts in England, by which the lands of the debtor are made responsible for his debts.²

679. The form of contracts under seal and not under seal will be discussed in another place.³

680. The subject will be considered by taking a view successively of contracts as they are, joint and several, conjunctive and disjunctive, divisible and indivisible, dependent and independent, principal and accessory, certain and hazardous, gratuitous and onerous, limited and unlimited contracts; as to the time of their performance, conditional and unconditional, penal, and illegal and fraudulent.

681. An individual may make an agreement with several others by which he promises to perform some act to them jointly, or to pay to each of them something separately; or several individuals may promise to one or more others that they will jointly perform certain things, or they may promise that the performance shall be by each of them, each binding himself independently of the other. The effect of these obligations depends upon the will of the contracting parties, but it not unfrequently happens that owing to the ignorance of the person who has drawn up the agreement, or from some other cause, it becomes

¹ In *Stackpole v. Arnold*, 11 Mass. 30, Chief Justice Parker says: "There are three classes of contracts, viz.: specialties, written contracts not under seal, and parol or verbal contracts." This is not in accordance with the classification, which has always been as stated in the text. But it must be said that the tendency of the age is to do away with the distinction accorded to sealed contracts. In former times, when writing was a rare accomplishment, sealing might well be regarded as an act of solemnity. But the sealing is now a mere formal act, and its necessity has been done away with in several of the states, and in others a mere scroll of the pen, no more significant than a signature, is enough. But whatever the tendency, the distinctions must still be regarded as stated in the text. Although there is no essential difference between written contracts not under seal and contracts by word of mouth, both of which are equally parol, there is an important difference in the incidents. Under the statute of frauds certain contracts must be in writing. These therefore are invalid if merely by spoken words. Also evidence as to what was said is not admitted to control a contract reduced to writing.

² 2 Sharswood, Blackst. Comm. 160.

³ Beyond, Chap. VI.

difficult to say what is the intention; to ascertain this, the courts have adopted certain rules which will be here examined.

682. Where a contract is made with several persons, it will be interpreted as joint or several, according to the words of the contract, if it be clearly expressed. But if the terms are ambiguous, then it will in general be decided by the interest of the parties, and if that interest be joint, then the contract will be joint. When the contract is to pay a whole sum to several parties, it is entire, although the shares of each party are stated. But if the agreement be to pay each party a distinct sum the contract is several.

In many cases the character of the consideration will decide; where a separate consideration moves from each party the contract is several. Or the intention will be gathered from the whole agreement. Thus, if two joint owners consign goods to one consignee, telling him that each owns one half, and giving separate instructions as to each half, the contract is joint.⁴

A release to a single obligor by one of many joint and several obligees, discharges the obligor from all liability to any of the others.⁵

683. When two or more persons join in an obligation, promise, or agreement to perform a certain thing, they are all liable, and on failure to fulfil their engagement, they must all be sued together. In their contracts partners always bind themselves jointly, for one has an implied authority to bind the rest in anything relating to the partnership.

Members of a club, which is a temporary association of persons for some special purpose, are generally jointly obligated to perform their agreements, and they may bind each other when specially authorized, or the authority may necessarily be implied.⁶

If the subject matter is joint the contract is joint, unless otherwise agreed, although it specifies the share for which each is bound.⁷

684. But it frequently happens that the debtors are bound both jointly and severally, when they are jointly responsible; and they are also individually responsible, at the choice of the creditor. The usual formula in these cases is this: We jointly and severally promise; or, We or either of us promise. Any other expression, however, which clearly shows that the parties intend to be severally and individually responsible, will be sufficient; as, We promise each for the whole.

685. When the contract is joint only, and one of the obligors dies, his liability dies with him, and the survivors alone are responsible. The creditor cannot reach the assets of the deceased, nor can the co-obligors enforce a remedy for contribution.⁸

But where it appears that by a mistake of fact an obligation was made joint when it was intended to be joint and several, contribution will be enforced in equity against the estate. And in general equity will presume such a mistake of fact where a benefit has been received by the deceased obligor.⁹ But when the contract is several, or joint and several, the estate of the deceased is liable at law.

686. The payment by one of several joint debtors discharges the others from the debt.

A release under seal given to one of several joint debtors discharges all,¹⁰ but

⁴ Hall v. Leigh, 8 Cranch, 51.

⁵ Decker v. Livingston, 15 Johns. N. Y. 479; Southward v. Packard, 7 Mass. 95.

⁶ Story, Partn. 144; Collyer, Partn. 31; Wordsworth, Joint St. Co., 154; Sawyer v. Meth. Epis. Soc., 18 Vt. 405; Slocum v. Fairchild, 7 Hill, N. Y. 292.

⁷ Ripley v. Crooker, 47 Me. 370; Brady v. Reynolds, 13 Cal. 31.

⁸ Foster v. Hooper, 2 Mass. 572; Watters v. Riley, 2 Harr. & G. Md. 305.

⁹ Hunt v. Rousmanier's Adm: 8 Wheat. 211; Yorks v. Peck, 14 Barb. N. Y. 644.

¹⁰ Lunt v. Stevens, 24 Me. 534; De Zeng v. Bailey, 9 Wend. N. Y. 336.

not so with a release not under seal.¹¹ A release of one obligor by operation of law, as by bankruptcy, will not discharge the other.¹²

Where one of several joint, or joint and several, obligors pays the debt, or more than his proportion of it, he is entitled to a just contribution from the others, and may recover it by action at law;¹³ or he may bring a bill in equity, which is better adapted for settling numerous claims.

If he has been compelled to pay the debt by suit, he is not entitled to contribution for the costs unless there was some reasonable cause for defending the action and incurring the costs.¹⁴

687. A *conjunctive agreement* is one which contains several things which are to be performed, the whole united by a conjunction, to indicate that they are all equally the object of the contract; for example, if I promise for a lawful consideration to deliver to you my copy of the Life of Washington, my Encyclopædia, and my copy of the History of the United States, I am bound to deliver all of them, and cannot be discharged by delivering one only, and I may deliver either in discharge of my contract *pro tanto*. But if my contract had not been in the conjunctive, but a unit or entire contract, as, if I promised for the same consideration to deliver to you all my library, (the very books in question,) you would not have been bound to receive a part in discharge of my obligation, because no one can be compelled to receive only a part of what is due to him on an entire contract.

Whether a contract is conjunctive or entire will depend upon the circumstances of each case. The question is whether the parties make a contract for the several articles as one whole, or whether there is a separate agreement as to each.

688. There are several contracts where a sum is to be paid in instalments; as an agreement to pay on the first day of January one thousand dollars, and on the first day of July another thousand dollars, although both engagements may be contained in the same agreement. In this case the creditor may compel the debtor to pay one instalment before the other becomes due, and the creditor may make a good legal tender of one instalment without tendering the other.

And where a note is given bearing interest, each instalment of interest is a separate debt, and may be sued for separately as it becomes due.

689. An agreement may be made by which the debtor shall be obliged to deliver one of two things which are the object of the contract. This is called an *alternative or disjunctive agreement*; as if, for a valuable consideration, I promise to deliver to you my copy of the Life of Washington or my copy of the History of the United States; it is evident I owe you but one of these books and not both, and I have the choice to deliver to you either in discharge of my engagement, unless I have also agreed to let you have the choice.¹⁵ Or, if I have agreed to deliver to you from seven hundred to a thousand barrels of meal, I have the choice to deliver to you the greater or the lesser amount.¹⁶

690. The contract may be to pay a certain sum at one time or a certain sum at another time. In that case the debtor has the right to choose whether he will pay the lesser sum at the first time mentioned or the greater sum at the other time; as where A agreed to pay B eight dollars per acre for a tract of

¹¹ Shaw v. Pratt, 22 Pick. Mass. 308; Seely v. Spencer, 2 Vt. 334.

¹² Ward v. Johnson, 13 Mass. 151; Sheehy v. Mandeville, 6 Cranch, 258.

¹³ Bachelder v. Fiske, 17 Mass. 469; Odin v. Greenleaf, 3 N. H. 270.

¹⁴ Fletcher v. Jackson, 23 Vt. 593; Beckley v. Munson, 22 Conn. 299; Davis v. Emerson, 17 Me. 64; Boardman v. Paige, 11 N. H. 431.

¹⁵ Choice v. Mosley, 1 Bail. So. C. 136.

¹⁶ Disborough v. Neilson, 3 Johns. Cas. N. Y. 81; Small v. Quincey, 4 Me. 497.

land in two several payments, and in case of default in either payment, then nine dollars an acre at a further specified time.¹⁷

691. When an agreement is in the conjunctive, but it is impossible for it to be so performed, it shall be taken in the disjunctive; as, where a man bound himself and his executors to do a certain thing, it was impossible to perform it because no man has executors while he is living, and after his death he cannot join them in the performance of the agreement.¹⁸

692. On the other hand, when in form the engagement is disjunctive or alternative, but, in fact, the party has no choice, it is then an absolute agreement; as, where I promised to deliver you one thousand dollars, or to make you a deed for a house which both of us believed to be mine, and afterward it is discovered that the house was yours and not mine, I am absolutely bound to pay you a thousand dollars.¹⁹

So also when one alternative is illegal the contract is absolute to perform the other.²⁰

693. The right to choose which of two things is to be delivered to fulfil an alternative obligation, called the right of election, is vested in the party to whom it is given by the agreement; but when there is no one selected to exercise this right, it belongs to the first agent, or he who is to do the first act,²¹ and on his failure to exercise it in proper time, the right passes to the other party.²²

Once made, the election is binding on the party: *electio semel facta, et placitum testatum, non patitur regressum.*²³

694. The end of this doctrine of the divisibility and indivisibility of contracts is to ascertain when they may be enforced in part or paid in part without the consent of the opposite party. When the debt is due and payable by one person to another, although susceptible of division by its nature, it must be executed between the parties as if it could not be divided. For example, I owe you one thousand dollars; this sum may be conveniently divided into two of five hundred dollars, but you cannot sue me for only five hundred as a part, and I cannot compel you to take five hundred dollars on account; a tender of less than the whole amount due is not a valid tender.

695. As I cannot transfer a greater right than I have, I cannot assign a part of the debt you owe me, so as to vest in my assignee a right to demand it and to sue you separately.

696. But when a contract is to do several things at several times, it is divisible in its nature, and each part may be separately enforced; as, when the defendant, being the keeper of an office for procuring crews of vessels, in consideration of the plaintiff's engagement to furnish such supplies and advances as might be necessary in the business, promised to pay the plaintiff a certain sum for each man shipped and to repay the advances, it was held that though the agreement was entire, the performance was several, and that an action would lie for each breach of the defendant's promise.²⁴ So, also, where the defendant by public advertisement offered a reward for a parcel of bank notes which had been lost, he was held liable to the finder of a part of them for a proportion of the reward.²⁵

¹⁷ Smith v. Sanborn, 11 Johns. N. Y. 59; Pate v. Hicks, Bendl. 158; Bacon, Abr. *Rent* (D), Bouvier, ed.

¹⁸ Rolle, Abr. 444; Bacon, Abr. *Conditions*, (P), Bouvier, ed.

¹⁹ Pothier, Obl. n. 249.

²⁰ Coke, Litt. 145 a.

²¹ Viner, Abr. *Election*, B. C; Pothier, Obl. n. 247; Bacon, Abr. *Elections*, (B).

²² Coke, Litt. 146; 11 Johns. N. Y. 241.

²³ Symmes v. Frazier, 4 Mass. 344. See Aldrich v. Fox, 1 Me. 316.

²⁴ Badger v. Titcomb, 15 Pick. Mass. 409.

Where a contract is made for the performance of an act, as to repair a house or to build a fence, the job being entire and no price is fixed for the whole job, the contract is divisible, and the workman may recover for part performance on a *quantum meruit*.²⁶ The contract may be such that there is absolutely no value in a part performance, as a contract to paint a portrait.

In contracts of sale where a quantity of goods is sold at so much per pound or bushel, it is often difficult to decide whether the contract is divisible or not. In such cases the question is whether the delivery of the whole quantity is of the essence of the contract; ordinarily such a contract is divisible, but the terms may show it to be entire,²⁷ and the matter must be decided upon the circumstances of each case. So where several articles are sold at the same time at separate prices.²⁸

697. But sometimes, when the creditor and debtor are each alone in making the contract, still it may be divided or apportioned. This happens particularly in the case of rents. This may take place in two ways: by the act of the reversioner alone; and, by virtue of particular statutes.

When there is a subsisting obligation on the part of the tenant to pay a certain rent, the reversioner may sell his estate in different parts, to as many persons as he may deem proper, and the lessee or tenant will be bound to pay to each a proportion of the rent.²⁹ It is usual for the owners of the reversion to agree among themselves as to the amount which each is to receive, but when there is no agreement, the rent will be apportioned by the jury.³⁰ On the other hand, when the owner of a rent charge purchases a part of the land, out of which it issues, the whole rent charge is extinguished.³¹ But there is a difference when part of the land comes to him by operation of law, as by descent, for then the rent charge is apportionable, the tenant and the heir being bound to pay according to the value of the lands held by them respectively.³² A rent service is apportionable in both cases.³³ The rent may also be apportioned if part of the land out of which the rent charge issues is recovered by title paramount.

Rent may also be apportioned by descent and judicial sales.

It may be apportioned as to time by virtue of the English statute 11 Geo. II, c. 19, s. 15, the principles of which have been re-enacted with some modifications or adopted in the several states. It provides that when rent is due by a tenant for life, and he dies during the currency of a quarter, or year, or other division of time at which rent was made payable, it shall be apportioned to the day of his death.

698. When the contract is entire, that is, when the consideration is entire on both sides, the entire fulfilment of the promise by either of the parties, as a condition precedent, is required before an action can be maintained; as where a sailor agreed to perform services on a certain voyage, for the whole time, for the consideration of thirty guineas, and he died during the voyage, it was held that the contract was entire, and that the whole service, which was a condition

²⁶ *Sickles v. Pattison*, 14 Wend. N. Y. 257.

²⁷ *Davis v. Maxwell*, 12 Metc. Mass. 290; *Story, Sales*, § 244; *Miller v. Goddard*, 34 Me. 102.

²⁸ *Barclay v. Tracy*, 5 Watts & S. Penn. 45; *Miner v. Bradley*, 22 Pick. Mass. 458; *Mills v. Hunt*, 20 Wend. N. Y. 431.

²⁹ *Bank of Pennsylvania v. Wise*, 3 Watts, Penn. 404; *Farley v. Craig*, 6 Halst. N. J. 262; *Nellis v. Lathrop*, 22 Wend. N. Y. 121; *Coke, Litt.* 158 a.

³⁰ 3 Kent, Comm. 470.

³¹ *Coke, Litt.* 147, 148. See 1 Swanst. Ch. 338, note a.

³² *Coke, Litt.* 49; *Bacon, Abr. Rent*, M.

³³ *Coke, Litt.* 49.

precedent to the payment of wages, not having been performed, no part of the thirty guineas could be recovered.³⁴

So where a ship is let to freight for a voyage, and is lost on the voyage, no freight is due. It is immaterial whether the performance of the contract is prevented by the negligence of the party or by inevitable accident.³⁵ But where one party is prevented from completing the contract by the fault of the other, the debt will be apportioned.³⁶

699. Where there are promises on both sides in an agreement, it becomes a question whether one party is bound to perform his before the opposite party shall be required to fulfil those on his side. This depends upon the contract of the parties, and the manner in which they have expressed themselves in the writing. When the performance of one depends on the prior performance of the other, the agreements or covenants are said to be *dependent*.³⁷ *Independent* covenants, on the contrary, are those where either party may recover damages from the other for the injury he may have sustained by a breach of the covenants in his favor, and when it is no excuse for the defendant to allege a breach of covenant on the part of the plaintiff.³⁸

When the agreements are dependent, neither party is bound actually to perform his part of the agreement to entitle him to a remedy for a breach by the other. It is enough that he was ready and able to perform his part, and offered to do so.³⁹

700. The true criterion to know whether covenants or agreements are dependent or not, is the intention of the parties, and this is to be discovered from the order or time in which the acts are to be done, rather than from the structure of the agreement or the arrangement of the words.⁴⁰ And mutual covenants will be construed as dependent or independent covenants, as it may best concur with the design of the whole instrument, and effectuate the intention of the parties.⁴¹

701. To discover the intention of the parties, four rules have been suggested; the first two relate to dependent, and the last two to independent contracts.⁴²

When the mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other.⁴³

Where the act of one party must necessarily precede any act of the other, as where one agrees to manufacture an article from materials to be furnished by the other, or to pay for goods on delivery, or to pay money on demand, the covenants are independent, and one act is a condition precedent to the other.⁴⁴

When mutual covenants go only to a part of the consideration on both sides,

³⁴ *Cutter v. Powell*, 6 Term, 326; Viner, Abr. *Apportionment*, where the author states a controversy he had with Sir John Strange on this subject. See *Jennings v. Camp*, 13 Johns. N. Y. 94; 1 Swanst. Ch. 338, note.

³⁵ *Gilpins v. Consequa*, 1 Pet. C. C. 91; *Cutter v. Powell*, 1 Smith, Lead. Cas. 13.

³⁶ *Moulton v. Trask*, 9 Metc. Mass. 577; *Wilhelm v. Caul*, 2 Watts & S. Penn. 26; *Chaplin v. Rowley*, 18 Wend. N. Y. 187.

³⁷ *McCrelish v. Churchman*, 4 Rawle, Penn. 26; *Tompkins v. Elliot*, 5 Wend. N. Y. 496.

³⁸ *Cook v. Johnson*, 3 Mo. 239; *Couch v. Ingersoll*, 2 Pick. Mass. 300.

³⁹ *Hammond v. Gilmore*, 14 Conn. 479; *Brown v. Gammon*, 14 Me. 276; *Moore v. Hopkins*, 15 La. Ann. 675.

⁴⁰ *Goodwin v. Lynn*, 4 Wash. C. C. 714; *Speake v. Sheppard*, 6 Harr. & J. Md. 85.

⁴¹ *Wright v. Smith*, 4 Watts & S. Penn. 527; *Adams v. Williams*, 2 Watts & S. Penn. 227.

⁴² *Platt*, Cov. 80.

⁴³ *Boone v. Eyre*, 1 H. Blackst. 273, note; 2 W. Blackst. 1312; *Howland v. Leach*, 11 Pick. Mass. 151; *Carman v. Pultz*, 21 N. Y. 547.

⁴⁴ *Bailey v. White*, 3 Ala. 330; *Knight v. New England Co.*, 2 Cush. Mass. 286; *Appleton v. Chase*, 19 Me. 74; *West v. Murphy*, 3 Hill, So. C. 284.

and when a breach may be paid for in damages, the defendant has a remedy on his covenant, and is not allowed to plead it as a condition precedent.⁴⁶

When a day is appointed for the payment of money, and the day comes before the thing for which the money is to be paid can be done, then, though the agreement is to pay the money before the doing of the thing, yet an action may be brought for the money before the performance; because the agreement is positive that the money shall be paid on that day, and the presumption is that the party intended to rely on his remedy and not on a previous performance.⁴⁶

702. A *principal agreement*, sometimes called a primary obligation, is that which is the principal object of the engagement, that which has been contracted mainly for itself; for example, the principal or primitive obligation of the seller is to deliver the thing sold, and to transfer the title to it.

The *accessory or secondary obligation* is one made for assuring the performance of the principal agreement, either by the same parties or by others, such as suretyship, mortgages, and pledges.

Anything which wholly discharges or releases the principal agreement, discharges also the accessory. But a statute bar has not this effect. Thus, a mortgage may be foreclosed, although the note secured by it is barred by the statute of limitations.

An accessory obligation may be implied, or may be a necessary consequence of the principal obligation, which arises naturally in consequence of the non-execution of the principal engagement, without any other or particular agreement; for example, damages become due by law and in equity, as a consequence of a breach of the agreement by an act of the debtor.

Or it may arise from a clause expressly inserted in the agreement, by which the party who is bound promises to pay a certain sum or deliver some other thing, in case he does not fulfil his principal engagement in due time; as where the parties agree that on failure to complete the contract, the delinquent shall pay liquidated damages.

Sometimes the accessory engagement takes the place of the principal, which is then annulled, so that the creditor cannot require its performance; for example, if the thing sold is lost through the fault of the seller, or while the title was in him, there then subsists only the accessory obligation of paying damages.

Sometimes the accessory obligation attaches to the principal without destroying it; they subsist together. For example, if the maker of a promissory note does not pay it when due, he owes the amount of the note and all the interest which afterward accrues.

703. An accessory obligation may be between the same parties as the principal one, as a mortgage, or it may be between different parties, as a contract of suretyship. Contracts of the latter kind must under the statute of frauds be in writing, and are discharged not only by the performance and release of the principal agreement, but also by any material change in its terms, as where the creditor suspends the right to enforce his remedy against the debtor.

704. If the parties to a principal contract have been guilty of any misrepresentation or concealment in inducing the surety to enter into the contract, it will be void.

If the principal obligation is void, the accessory obligation will be void also.

⁴⁶ Cook v. Johnson, 3 Mo. 239; Fisk v. Tank, 12 Wisc. 276.

⁴⁶ Millens v. Cabiness, 1 Ala. 21; Wilcox v. Ten Eyck, 5 Johns. N. Y. 78; Botts v. Perine, 14 Wend. N. Y. 219; Couch v. Ingersoll, 2 Pick. Mass. 300; Seers v. Fowler, 2 Johns. N. Y. 272.

705. Considered in relation to their effects, contracts are either certain or hazardous.

706. A *contract* is *certain* when the thing to be done is supposed to depend on the will of the party, or when in the usual course of events it must happen in the manner stipulated. These contracts are regulated by the rules which have been stated in relation to contracts generally.

707. A *contract* is *hazardous* when the performance of that, which is one of its objects, depends on an uncertain event, such as insurance, gaming, wagers. These will be considered under another head, when we come to treat of particular contracts.

708. An *onerous contract* is one which is made for a valuable consideration given or promised, however small, such as sale, hiring, partnership, barter, and the like.

709. A *gratuitous contract* is one by which one of the parties procures for the other an advantage without any benefit to himself, such as commodatum, deposit, mandate, donation or gift, and becoming security for another. The subjects of commodatum, deposit and mandate we will examine when we come to consider the law of bailments, to which they belong.

710. A *gift* of personal chattels is the act by which the owner of a thing voluntarily transfers the title and possession of the same from himself to another person, who accepts it without any consideration whatever. It differs from a grant, sale or barter in this, that in each of these cases there must be a consideration; and a gift, as the definition states, must be without a consideration.⁴⁷

The manner of making the gift may be in writing or by parol, and, as far as personal chattels are concerned, they are equally binding.⁴⁸

711. Gifts are divided into gifts *inter vivos* and gifts *causâ mortis*. They are also divided into simple or proper gifts, that is, such as are to take immediate effect without any condition; and qualified or improper gifts, or such as derive their force upon the happening of some condition or contingency; as, for example, a *donatio mortis causâ*.

712. A *gift inter vivos* is one made by one or more persons, without any prospect of immediate death, to one or more others.

Gifts *inter vivos* are so called to distinguish them from gifts in contemplation of death or *mortis causâ*, for they differ essentially. A gift *inter vivos*, when completed by delivery, so passes the title to a thing that it cannot be recovered back by the giver;⁴⁹ the gift *mortis causâ* is always upon the implied condition that the giver may at any time during his life revoke it.⁵⁰ A gift *inter vivos* may be made by the giver at any time; the *donatio mortis causâ* must be made by the donor while in peril of death. In both cases there must be a delivery.

Without a delivery a gift *inter vivos* has no effect whatever.⁵¹

The delivery must be according to the nature of the thing. If it is not capable of actual delivery, there must be such a delivery as it is capable of, or symbolical.⁵² If it is a chose in action, there must be such an assignment as to pass a full title.

The donor's own promissory note cannot be the subject of a gift.⁵³

Gifts may be made expressly or by implication. A gift will be implied

⁴⁷ 2 Sharswood, Blackst. Comm. 440.

⁴⁸ Perkins, Conv. § 57; 2 Sharswood, Blackst. Comm. 441.

⁴⁹ McKane v. Bonner, 1 Bail. So. C. 113.

⁵⁰ Wells v. Tucker, 3 Binn. Penn. 366.

⁵¹ Noble v. Smith, 2 Johns. N. Y. 52; Ewing v. Ewing, 2 Leigh, Va. 337; Reed v. Spaulding, 42 N. H. 114.

⁵² Allen v. Cowan, 23 N. Y. 502.

⁵³ Phelps v. Pond, 23 N. Y. 69; Starr v. Starr, 9 Ohio, St. 74.

when a father, on the marriage of his daughter, sent home with her personal property suitable for her condition.⁵⁴

A gift made by a man in insolvent circumstances is revocable by his creditors. It is not void merely because the giver was indebted at the time; the amount of his property over his indebtedness, the amount of the gift, and other circumstances are to be taken into account. But in general, a gift is revocable in favor of creditors existing at the time of the gift, but not as to subsequent creditors.

713. A gift in prospect of death, *donatio mortis causa*, is the act of a person who, apprehending his dissolution near, delivers, or causes to be delivered to another, the possession of any personal goods, to keep as his own in case of the death of the giver. This gift is always upon the implied condition that if the donor dies the donee shall possess it absolutely, and that if the donor should survive or repent of having made the gift, then the donee shall return it to the donor.

714. This amphibious gift so far resembles a legacy that it is ambulatory and incomplete during the donor's life; it is therefore revocable by him,⁵⁵ is subject to his debts, and is revoked like a legacy by the subsequent birth of a child.⁵⁶ But in the following particulars it differs from a legacy: it does not fall within an administration, nor are any acts of the executor required to give a complete title to the donee.

715. The following circumstances are necessary to constitute a good *donatio mortis causa*:

That the thing given be personal property,⁵⁷ but it need not be in possession; it may be a chose in action, as a policy of life insurance,⁵⁸ a promissory note,⁵⁹ a bond.⁶⁰ The donor's own note, check or bond is not a good *donatio mortis causa* unless paid in his lifetime.⁶¹

That the gift be made by the donor in peril of death or during his last illness, and to take effect only in case the giver die.

That the subject be actually delivered,⁶² but the delivery may be made to a third person in trust for the donee.⁶³ A bond, mortgage or sealed note, which does not pass by delivery, must be effectually endorsed and assigned.⁶⁴

716. *Suretyship* is an agreement to answer for the debt, default or miscarriage of another, by which the surety becomes bound as the principal or original debtor is bound. It is closely related to the contract of guaranty. Suretyship is a primary obligation to see that the debt is paid; guaranty is a collateral undertaking, essentially in the alternative to pay the debt if the principal debtor does not. A surety may be sued as a promisor to pay the debt, a guarantor must be sued specially on the contract.

The contract of suretyship is within the provisions of the statute of frauds, and must be in writing.

To constitute this contract there must be a principal obligation; if this is void,

⁵⁴ McCluney v. Lockhart, 4 M'Cord, So. C. 251. See Grangiac v. Arden, 10 Johns. N. Y. 293.

⁵⁵ Merchant v. Merchant, 2 Bradf. Surr. N. Y. 432.

⁵⁶ Bloomer v. Bloomer, 2 Bradf. Surr. N. Y. 339.

⁵⁷ Wells v. Tucker, 3 Binn. Penn. 366; Wright v. Wright, 1 Cow. N. Y. 596.

⁵⁸ Witt v. Amis, 1 Ell. B. & S. 109.

⁵⁹ Bates v. Kempton, 7 Gray, Mass. 382; Caldwell v. Renfrew, 33 Vt. 213; Chase v. Redding, 13 Gray, Mass. 418; Turpin v. Thompson, 2 Metc. Ky. 420.

⁶⁰ Waring v. Edmonds, 11 Md. 424; Lee v. Boak, 11 Gratt. Va. 182.

⁶¹ Flint v. Pattee, 33 N. H. 520; Cander v. Henderson's Appeal, 27 Penn. St. 119.

⁶² McKenzie v. Downing, 25 Ga. 669; Cutting v. Gilman, 41 N. H. 147.

⁶³ Dresser v. Dresser, 46 Me. 48; Michener v. Dale, 23 Penn. St. 59.

⁶⁴ Overton v. Sawyer, 7 Jones, No. C. 6.

or not enforceable, the contract may be good, but is a primary obligation, not that of suretyship.

No particular form of words is necessary to the contract. The extent of the obligation of the surety cannot exceed that of the principal, though it may be less, and it cannot be extended beyond the precise terms of the contract. But the remedies against the surety may be more extensive than those against the principal. The creditor is entitled to the benefit of all collateral security which the debtor has given to the surety to indemnify him.

The creditor cannot sue the surety until the principal debt is fully due. But when a breach of the contract occurs he may proceed at once against the surety, although he has other collateral security.

When a surety pays the principal debt after default of the debtor, he becomes subrogated to the rights of the creditor, and can recover from the debtor all that the creditor could.

Where one of several co-sureties pays the debt he is entitled to contribution from the others.

The contract of suretyship will be more fully treated of when we come to consider the nature of particular contracts.⁶⁵

717. Every obligation is pure and simple, or conditional, or payable at a future time. When time is given or limited for the payment or performance of a contract, this time is called its *term*. An obligation is pure or simple when there is not attached to the contract either a condition or a term; in that case it receives all its effects the moment the contract is concluded, and it may be enforced without delay.⁶⁶

A conditional agreement arises the moment the condition has been fulfilled; till then its existence and consequently its execution are suspended.

A contract to be fulfilled at a future day, like a pure or simple engagement, arises the moment the agreement has been concluded; but it differs from it in this, that its execution is suspended until the term arrives: in other words, although it is owing, it is not payable till it becomes due.

718. The term or delay authorized by law in fulfilling a contract is certain or uncertain; express or implied; it is of right or the consequence of some provision of law.

719. The *term* is *certain* when the time for fulfilling the obligation or for making payment must come certainly; as, I promise to pay you one thousand dollars on the fourth of July, 1876.

It is *uncertain* when the day fixed for the performance is unknown; and it may be uncertain in several ways. It may be uncertain whether it will ever arrive, or if it shall arrive, when it will come; for example, I promise to pay you so much when you shall marry, or when you are elected president of the United States. This double uncertainty is rather a condition than a term.

It may be uncertain as to the day when the time shall come, although the time it will come, if it does come, be not uncertain, as when you arrive at the age of thirty years. This is also in the nature of a condition.

The term may be fixed at a time which is uncertain, but which must come, as, I promise to pay you so much the next day after the death of Titius.

720. The *term* is *express* when it is particularly stated in the agreement; *implied*, when it is not. If, for example, a workman should agree with you to mow your grass or to reap your wheat, it is evident he could do it only during the season when those crops are to be gathered, and the contract could not be enforced before, although it was made on the first day of January; but

⁶⁵ Beyond, 1383-1434.

⁶⁶ Kendall v. Talbot, 1 A. K. Marsh. Ky. 321; Payne v. Mattox, 1 A. K. Marsh. Ky. 164. Vol. I.—W

if on that day, he had promised to pay you a sum of money, he would be obliged to pay it at once.

721. The time of payment is a right when it is agreed upon, either expressly or by implication, and no longer delay can be given to the creditor without violating the law of the contract.

722. But sometimes, from public considerations, though the right of the creditor be not taken away, yet the remedy he has against his debtor is suspended. This is never done to favor an individual, but because the public good requires that he should be left free to attend to his public duties, unembarrassed by his private concerns.

Members of the national and state legislatures are, in general, free from suits or actions while the body to which they belong is in session, and for a reasonable time in going to and returning from the seat of government.⁶⁷

Electors under the constitution of the United States, or of the several states, while attending to their duties as such, and going to, staying at, or returning from an election, *eundo, morando, et redeundo*, cannot be served with process on civil contracts. And soldiers in the actual service of the United States are also privileged; so are parties and witnesses while attending court; and if any writ demanding bail issued against them in a civil case be executed on them, the court will discharge them; or, if a summons be served on them, the service of the writ will be set aside.

723. But, although the obligor, under these circumstances, cannot be compelled by action to pay his debt, yet this case differs from the one where the debt is owing, but is not due; for example, a debt due by a person privileged cannot be collected until the end of the time of the privilege, as if it were not due, but if the privileged person should sue the other, the latter may set off the claim he has against the plaintiff, because the right exists, and it is the remedy only which is suspended.

724. By the almost universal practice among merchants in this country, the holder of a bill of exchange or promissory note cannot demand payment of it nor protest it till the end of three days after it becomes due by the terms of the contract, which three days are called days of grace.

725. In most, if not in all the states, the debtor is allowed a time after judgment has been rendered against him, upon giving security to pay at a future day, in violation of the letter of the contract; and it is justifiable only on the ground that when the parties deal, they agree tacitly to make the laws of the land, as far as they operate on their contracts, a part of them.

726. In general, the term or time allowed for the performance of the agreement is for the benefit of the debtor, and, with the consent of the creditor, he may doubtless pay the debt or discharge himself before his obligation is exigible. But without such consent, has he the right to do so?

If the agreement is to pay a sum of money at the end of a year, with interest, it is evident he cannot pay before the end of the term without the consent of the creditor, unless he offers to pay interest for one year. But even then a question may be fairly raised whether he can so pay. The creditor may have no place for his money till the end of the time, or he may be in a place where the possession of money, if known, would endanger his life, and it would be imposing a burden upon him to compel him to take care of it and run all risks of its loss. Besides, there are times when money is not worth so much as at other periods; for example, when certain banks, which regulate the currency, have extensive issues, money is less valuable than at other and different times. Upon principle it is evident that the debtor cannot throw a burden

⁶⁷ Jefferson, Man. § 3; Story, Const. §§ 856-862.

on the creditor, and that it is no difference whether the thing to be paid is money or any thing else. Suppose you agree to deliver me a pair of horses on the first day of April, have you a right to deliver them to me on the first day of January, and by that means compel me to winter them, when they are useless to me? If you have no right to make me keep the horses, by what authority or justice can you compel me to keep the money?

727. It is always of importance to know when a debt becomes due. The creditor cannot sue till the time has expired, nor can he set off his claim against the demand of his debtor. When a party is bound by contract to do a thing, as to pay money on a certain day or on one of several days, no place of performance being specified, he has the whole of the day or the last of the several days for the performance of the contract. But he must do all that he can do alone necessary to complete the performance of the contract within the day. If goods are to be delivered, it must be at such an hour of the day as to enable the other party to examine and receipt for them. If money is to be paid, time must be allowed to count it. The day lasts until midnight, and a breach of the contract does not arise until midnight of the day of performance. But a usage may be adopted into a contract requiring the performance to be within certain hours, as money to be paid before the banks close.

728. But when the day of performance is not specified, as when on the first day of January I promise to pay you in ten days, in a month or a year, a question arises if the term *a quo*, the first day of the term, is included in the delay. The rule is, that unless something appears in the contract to the contrary, the first day is not included, and the bill due in ten days would not be due till the end of the eleventh day, and no suit could be brought till the twelfth.⁶⁸ To prevent the interminable difficulties which would arise if time was computed by days, hours, and minutes, in such cases the rule is to exclude the day *a quo*, there being for this purpose no fractions of days.⁶⁹

729. But another difficulty arises in the computation of months. Astronomical months are composed of the time which is employed by the sun in performing one-twelfth part of his course around the zodiac; all these months are, therefore, of equal length. The civil months, January, February, March, etc., are unequal; and the question arises how shall they be computed when the payment is to be made in so many months? The rule is, to compute by civil or calendar months.⁷⁰

730. A *conditional contract* is one subject to a condition; an *unconditional contract* is one which does not depend on any condition whatever.

In its most extended sense, the word condition signifies a clause in an agreement which has for its object to suspend, to rescind, or to modify the principal obligation; or, in a will, to suspend, revoke, or modify the devise or bequest.⁷¹

Conditions which go to defeat an estate or destroy the efficacy of an act, are strictly construed; while those which go to vest an estate are liberally con-

⁶⁸ *Homes v. Smith*, 16 Me. 181; *Ewing v. Bailey*, 5 Ill. 420.

⁶⁹ *Portland Bank v. Maine Bank*, 11 Mass. 204; *Page v. Weymouth*, 47 Me. 238; *Gorham v. Wing*, 10 Mich. 486; *Robinson v. Foster*, 12 Iowa, 186. But the rule that there are no fractions in a day will not be so applied as to do injustice, as where a sale was made of real estate in trust, and it was registered a short time, less than a day, before an execution was issued, the fiction was made to yield to the justice of the case. *Metz v. Bright*, 4 Dev. & B. No. C. 173. In the matter of *Richardson*, 2 Stor. C. C. 571; *Johnston v. Pennington*, 3 Green, N. J. 188.

⁷⁰ *Churchill v. Merchants' Bank*, 19 Pick. Mass. 532; *Thomas v. Shoemaker*, 6 Watts & S. Penn. 179; *Hunt v. Holden*, 2 Mass. 170; *Avery v. Pixley*, 4 Mass. 460; *Gross v. Fowler*, 21 Cal. 392; *Glenn v. Hibb*, 17 Md. 260; *Mitchell v. Woodson*, 37 Miss. 567.

⁷¹ *Justinian*, Inst. 3, 16, 4; *Voet*, ad Pand. l. 28, t. 7; *Coke*, Litt. 201 a.

strued.⁷² The condition of an obligation is said to be the language of the obligee, and for that reason to be construed liberally in favor of the obligor. A court of equity will not lend its aid in enforcing a forfeiture for breach of condition so as to divest an estate.⁷³

731. Conditions suspend the obligation when they are to have no effect until they are fulfilled; as, if I bind myself to pay to you a thousand dollars on condition that the ship Thomas Jefferson shall arrive in the United States from Havre, the contract is suspended until the arrival of the ship.

732. Sometimes the non-performance of the condition rescinds the contract; as, if I sell to you my horse on condition that he shall be alive on the first day of January, and before that day he dies.

733. A condition may modify the contract, and change it to some extent from what it was before, leaving it in full force as to some parts of it, and of no force as to others; for example, if I sell to you two thousand bushels of corn, upon condition that my crop shall produce so much, and it produces only fifteen hundred bushels, the contract is modified; it is for fifteen hundred bushels and no more.

734. In a more confined sense, a condition is a future and uncertain event, on the existence or non-existence of which is made to depend, either the accomplishment, the modification, or the rescission of an obligation or testamentary disposition.

735. A condition is created by inserting the very word *condition*, or *on condition*, in the agreement or will; there are, however, other words that will do so effectually, as, *proviso*, *if*, etc.⁷⁴

No particular words are necessary to constitute a condition. The intention of the parties is to be gathered from the whole contract.⁷⁵

A condition must be created at the same time as the principal contract, though it may be by a separate instrument.

736. The principal points of view under which they are considered are: their several kinds; their effect; and their performance. These will be discussed in order.

737. Conditions are of various kinds: as to their form, they are express or implied; as to their object, they are lawful and unlawful; as to the time when they are to take effect, they are precedent or subsequent; as to their nature, they are possible or impossible; as to their divisibility, they are copulative or disjunctive; as to their operation, they are positive or negative; as to their agreement with the contract, they are consistent or repugnant; as to their effect, they are resolutive or suspensive. These will be severally considered.

738. When a party enters into a contract, and is desirous to do so upon a condition, he is carefully to have that condition stated in the agreement, so that no mistake in relation to it can take place; this is called an *express* condition.

739. But there are many conditions which, though not thus expressed, are not the less binding, and these are *implied* conditions. They exist tacitly in all contracts and wills, although they have not been expressed, *quæ tacite insunt*. These implied conditions may arise from three different causes: from the law, which supplies them; from the nature of the contract, or of the things which are its objects; from the presumed will of the contracting parties or of the testator.

⁷² Emerson v. Simpson, 43 N. H. 475; Hooper v. Cummings, 45 Me. 359.

⁷³ Smith v. Jewett, 40 N. H. 530.

⁷⁴ Bacon, Abr. *Conditions* (A).

⁷⁵ Knight v. New England Co., 2 Cush. Mass. 286; Grey v. Friar, 26 Eng. Law & Eq. 27.

From the law, as the revocation of a will, in cases of after-born children; that tenant for life shall not commit waste.⁷⁶

From the nature of the thing, as when the thing which is the object of the agreement does not exist, but may exist at a future time; as if I sell you the colt which my mare, now pregnant, may bring forth, and she meets with an accident which produces an abortion, it is evident that there has been no sale; the agreement was subject to the tacit or implied condition that a colt should be born.

Implied conditions may arise from the probable intention of the contracting parties, or of the testator. An example is given in the Roman law. If I bequeath to Titius one thousand dollars, upon condition that my ship shall arrive from Europe; and in another part of my will I add these words: I do hereby add to the legacy given to Titius five hundred dollars; the second legacy is considered as given on the same condition, that my ship shall arrive from Europe.

Again, I bequeath to you one thousand dollars which Titius owes to me, and at my death it is found that Titius owes to me nothing; or I give to you the sum of one thousand dollars which is in my fire-proof, and at my death there is no money there; the legacy fails in both cases, because both were given upon condition—one that Titius should owe me, and the other that I should have the money in my fire-proof.

740. A *lawful condition* is one made in consonance with the law; this must be understood of the law as existing at the time of making the condition, for no change of the law can change the force of the condition. For example, a conveyance was made to the grantee on condition that he should not aliene until he arrived at his full age. When the condition was imposed, twenty-five years was the age of majority in the state, and it was afterward changed to twenty-one. After the law was so changed the grantee aliened, and made a second conveyance after he attained the age of twenty-five years. The first was declared to be invalid.⁷⁷

741. An *unlawful condition* is one forbidden by law. Unlawful conditions have for their object to do something *malum in se*, or *malum prohibitum*; to omit the performance of some duty required by law; to encourage such acts of omission; or to do something contrary to public policy; as where a testator gave his wife a legacy on condition she should not marry. But a distinction must be observed between a condition and a limitation. When the thing is given until a certain event shall arrive, it is a limitation and it is good; as, "I give my wife five hundred dollars a year until she shall marry, or while she remains my widow;" this ceases on marriage. But if the form of the bequest had been, "I give five hundred dollars a year to my wife during her life, provided she shall not marry," this is a condition contrary to the policy of law in respect to marriage, and void.⁷⁸

Conditions in general restraint of marriage are void, but not so of conditions restraining from marriage to a particular person.

A condition in a devise of land that it shall not be subject or liable to attachment is void, as being against public policy.⁷⁹

742. A condition may be either precedent or subsequent. A *condition precedent* is one which must happen before either party is bound by the contract, and

⁷⁶ Coke, Litt. 233, b.

⁷⁷ Dugal v. Fryer, 3 Mo. 40; Collins v. Clamorgan, 6 Mo. 169; Collins v. P. Clamorgan, 5 Mo. 272.

⁷⁸ Bacon, Abr. *Conditions* (H); 2 Blackstone, Comm. 155; 10 Coke, 41; Coke, Litt. 236, b; 1 Vern. Ch. 483, n.

⁷⁹ Blackstone Bank v. Davis, 21 Pick. Mass. 42.

until this happens, there is no contract.⁸⁰ If a condition precedent becomes impossible, the contract is annulled.

743. A *condition subsequent* is one which is to happen after the performance of the contract, and operates to enlarge or defeat an estate or right already vested or created.⁸¹

If a condition subsequent becomes impossible by the act of God, the estate or right becomes absolute.

Whether a condition shall be considered as precedent or subsequent depends not upon the form or arrangement of the words, but on the manifest intention of the parties on the fair construction of the agreement.⁸²

744. A *condition* is *possible* when it may be performed, and there is nothing in the laws of nature to prevent its performance. But sometimes a possible condition becomes impossible in consequence of a circumstance added to it; as, a condition to build a large house in one day.

745. An *impossible condition* is one which cannot be accomplished according to the laws of nature.

There are impossibilities which are perpetual, and others which are not so, as that a blind man should see. The impossibility is perpetual when the organs of sight are entirely destroyed; it is temporary when sight may be restored by a surgical operation.

Impossibilities are also absolute and personal or merely relative; I cannot, for example, make a picture or a statue like those made by the best artists. When the impossibility is not natural, but relative, the condition is binding and must be performed; as if I engage to fulfil a condition to make a watch, the condition is binding, although it is impossible for me to perform it, because it is a thing which may be done by another. But besides, although in my present situation I cannot make a watch, I may learn the art, and in the end make one. Thus most of the impossibilities which are not so in their nature, may cease by the aid of art, and the conditions to perform them are valid.

746. But the condition may have been impossible from the beginning. In this case the condition is in general void.⁸³

747. When the condition becomes impossible by the act of God, it either vests the estate or right, or it does not, as it is precedent or subsequent, as already explained.⁸⁴ When it becomes impossible by the act of the party who imposed it, the estate or right is rendered absolute.⁸⁵

748. A *copulative condition* is one containing several distinct matters, the whole of which are made precedent to the vesting of an estate or right; in this case the whole of the condition must be performed, or the estate or right can never arise.⁸⁶

749. A *disjunctive condition* is one in which the party to be affected by it has the right to perform one or the other of several alternatives.

750. A *positive condition* is where the thing which is the subject of it must happen; as, if I marry.

751. A *negative condition* is where the thing which is the subject of it must not happen: as, if I do not marry.⁸⁷

752. A *consistent condition* is one which agrees with all other parts of

⁸⁰ *Hayden v. Stoughton*, 5 Pick. Mass. 528; *Milldam Foundry v. Hovey*, 21 Pick. Mass. 417.

⁸¹ *Dresser Mfg. Co. v. Waterston*, 3 Metc. Mass. 9.

⁸² *Robbins v. Gleason*, 47 Me. 259; *Sanders v. Whitesides*, 10 Cal. 88; *Knight v. New England Co.*, 2 Cush. Mass. 286.

⁸³ *Racine Bank v. Ayers*, 12 Wisc. 512.

⁸⁵ *Bacon, Abr. Conditions (M)*; *Rolle, Abr.* 420.

⁸⁷ *Pothier, Obl.* n. 200.

⁸⁴ *Coke, Litt.* 206, a, 218, b.

⁸⁶ 2 *Freem.* 186.

the contract, or which by a just construction can be reconciled with every other part.

753. A *repugnant condition* is one which is contrary to the contract itself; as, if I grant to you a house and lot in fee, upon condition that you shall not alien, the condition is repugnant and void, as being inconsistent with the right granted.⁸⁸

754. A *resolatory condition* is one which has for its object, when accomplished, the revocation of the principal obligation; for example, I will sell to you my crop of cotton, if my ship America does not arrive in the United States within six months. My ship arrives within one month, my contract with you is revoked.⁸⁹

755. A *suspensive condition* is one which suspends the fulfilment of the obligation until it has been performed; as, if I bind myself to pay to you a hundred dollars upon condition that the ship Thomas Jefferson shall arrive from Europe. The obligation in this case is suspended until the arrival of the ship, when, the condition having been performed, the contract becomes absolute, and it is no longer conditional. A suspensive obligation is in fact a condition precedent.

756. Properly speaking, a condition has only the effect to suspend the obligation. To analyze this, let us examine conditions at three different times:

When the condition is depending, and it is uncertain whether it will happen or not;

When it has happened;

When it has failed, or it is certain it will not happen.

757. Before the happening of a condition precedent, there exists no obligation; it is then only in expectation; the property in the thing, which is the object of a conditional agreement or a conditional legacy, remains with him who is bound to deliver it under a condition. The thing continues at his risk, if it should be entirely lost. If, for example, I bind myself to deliver to you a particular horse, upon condition that you pay to me two hundred dollars within ten days, and before the time expires the horse dies, the contract is dissolved, and the loss is mine.

When the condition is subsequent, the obligation is in effect during the pendency of the condition, subject to be rescinded or modified in case of non-performance of the condition. Thus, if I convey land on condition that the grantee shall not erect any building on it, the grantee has an estate in fee simple until the condition is broken.

758. The moment the condition has been performed, it is to be considered as if the obligation had then been made without condition, that is, the obligation which till then was suspended, acquires its full force and becomes binding; as, if I promise to pay to you one thousand dollars if you will marry my niece, I become bound to pay to you the money as soon as you have married her.

The performance of a resolatory condition immediately destroys the obligation; as, for example, the payment of the money mentioned in the condition of a common bond destroys the obligation.

759. In general a breach of a condition in a conveyance will forfeit the

⁸⁸ Bacon, *Abr. Conditions* (L). See *Taylor v. Mason*, 9 Wheat. 325; *Newkerk v. Newkerk*, 2 Caines, N. Y. 345; *McWilliams v. Nisly*, 2 Serg. & R. Penn. 513.

⁸⁹ There is a difference between a resolution and a rescission. The former is the act by which a contract which existed and was good is rendered null; it always presupposes the contract to have been valid, and it is owing to some cause posterior to the agreement that the resolution takes place; while rescission, on the contrary, supposes that some vice or defect annulled the contract from the beginning.

estate granted, or entitle the party to a re-entry.⁹⁰ And if a lease is to become null on the breach of a condition, it becomes so, *ipso facto*, on the breach of the condition, and cannot be set up by a subsequent recognition.⁹¹ In most cases an action on the agreement may be sustained for damages on the breach of the condition.

The contract will become absolute where the condition was illegal or repugnant when the contract was made, or becomes so afterward. So the breach of condition is excused where its performance by one party is prevented by the other.⁹² The party entitled to take advantage of the breach may waive the forfeiture,⁹³ and if once waived the remedy for forfeiture is gone for ever.⁹⁴

The party to the contract is the only one who can take advantage of the breach.⁹⁵

The breach of a condition subsequent does not operate *ipso facto* to divest an estate. The party entitled to take advantage of the forfeiture must take some steps to enforce his right. If the condition affects a grant of real estate the grantor must enter for breach.

Equity may relieve against forfeiture for breach of condition, when called for by the rules of equity.⁹⁶

The acceptance of a deed on condition amounts to an agreement by the grantee to perform the condition.⁹⁷

760. In general the conditions must be literally accomplished, *in forma specificata*, but they may be performed by an equivalent, *per æquipollens*, when such appears to have been the intention of the parties; and this intention is naturally presumed when one of them has not apparently any interest that it should be accomplished in one way rather than another; for example, I have promised to pay you one hundred dollars, but before the term of payment has arrived I die; it is of no consequence to you whether the condition be fulfilled by my executor or myself.⁹⁸ In a case, however, where the condition must be performed by me personally, as if I promised to marry Maria, then it cannot be performed by my executor.

When no time is fixed for the performance of a condition it must be performed within a reasonable time.

A condition precedent must be strictly performed in order that the party performing it may enforce the contract against the other.⁹⁹

761. When the condition consists of several parts, one of which was not possible to be performed at the time of making the agreement, the other must be performed. But if the condition be in the disjunctive or alternative, which gives the party the right to perform the one or the other, and one becomes impossible by the act of God, the whole will, in general, be excused.¹⁰⁰

762. A *penal clause* in an agreement is, as the word indicates, that which imposes on a person the necessity of paying a sum of money or other thing, to

⁹⁰ Gray v. Blanchard, 8 Pick. Mass. 284; Johnson v. Topping, 1 Wend. N. Y. 388; Jackson v. Pike, 9 Cow. N. Y. 69.

⁹¹ Kenrick v. Smick, 7 Watts & S. Penn. 41.

⁹² Williams v. Bank of U. S., 2 Pet. 102; Merrill v. Emery, 10 Pick. Mass. 507; Miller v. Ward, 2 Conn. 494; Crump v. Mead, 3 Miss. 233; Cape Fear Co. v. Wilcox, 7 Jones, No. C. 481.

⁹³ Betts v. Perine, 14 Wend. N. Y. 219; Lindsey v. Gordon, 20 Me. 69; Sharon Iron Co. v. Erie, 41 Penn. St. 341.

⁹⁴ Farley v. Farley, 14 Ind. 331.

⁹⁵ Dewey v. Williams, 40 N. H. 222; Hooper v. Cummings, 45 Me. 359; Smith v. Brannan, 13 Cal. 107; Boyer v. Tressler, 18 Ind. 260.

⁹⁶ Bethlehem v. Annis, 40 N. H. 34.

⁹⁷ Spalding v. Hallenbeck, 30 Barb. N. Y. 392.

⁹⁸ Rolle, Abr. 451.

⁹⁹ Hunt v. Livermore, 5 Pick. Mass. 395; Shaw v. Turnpike Co., 2 Penn. 454.

¹⁰⁰ Bacon, Abr. Conditions (Q), 1.

punish him for not having executed a prior obligation, or for having delayed in its execution. The object of such a clause is to insure the primary obligation. A penal clause in an agreement supposes two obligations, one of which is the primitive or principal, and the other the conditional or accessory; for example, I promise you to tear down a house which obstructs your view, or to pay you one thousand dollars: two distinct promises are here plainly distinguishable; to tear down my house, and to pay you one thousand dollars.

763. A penal differs from an alternative obligation; for an alternative obligation is but one in its essence, while a penalty always includes two distinct engagements, and when the first is fulfilled, the other is void.

764. When a breach of a penal agreement has taken place, the obligee has his option, in those cases which cannot be relieved in equity, to require the fulfilment of the first obligation, or the payment of the penalty, when the penalty is considered as liquidated damages.

When the penalty is not considered as liquidated damages, the obligee can only recover the amount of actual damages sustained, not exceeding the amount of the penalty.

765. It is difficult in many cases to distinguish between a penalty and liquidated damages.¹⁰¹ In general the courts have considered the sum reserved by such agreement to be a penalty rather than as stipulated damages. The sum will be considered as a penalty, and not as stipulated damages, in the following cases:

When the parties to the instrument have expressly declared the sum to be a penalty, and no other intent can be collected from the instrument.

When, from the face of the instrument, as in the case of a money bond, it is sufficiently clear that a penalty was meant.¹⁰²

When it is doubtful whether the sum was intended as a penalty or not, and a certain damage or debt is made payable on the face of the instrument.

When the agreement was evidently made for the attainment of another object, to which the sum specified is wholly collateral.¹⁰³

When the agreement contains several matters of different degrees of importance, and yet the sum is payable for the breach of any, even the least.¹⁰⁴

When the contract is not under seal, and the damages may be ascertained and estimated; and this although the parties have expressly declared the sum to be liquidated damages.¹⁰⁵

When the instrument provides that a larger sum shall be paid upon default to pay a lesser sum.¹⁰⁶

When a certain sum is stipulated to be paid for the breach of any one of several covenants of several degrees of importance, in respect to any one of which the exact damages for breach are certain, or can be readily ascertained by a jury.¹⁰⁷

766. A court of equity may relieve from a penalty, after a forfeiture, upon the performance of the contract or offer to perform; but not in the case where the penal clause is for liquidated damages.

The relief in equity proceeds on the ground that, the penalty being designed merely as a security, if the obligee obtains the performance of the contract or his damages, he gets all that he contracted for. But equity only interferes when it

¹⁰¹ *Gowen v. Garrish*, 15 Me. 278.

¹⁰² *Taylor v. Sandiford*, 7 Wheat. 13; *Watts v. Sheppard*, 2 Ala. n. s. 425.

¹⁰³ *Burr v. Todd*, 41 Penn. St. 206.

¹⁰⁴ *Owens v. Hodges*, 1 M'Mull, So. C. 106; *Daily v. Litchfield*, 10 Mich. 29.

¹⁰⁵ *Watts v. Sheppard*, 2 Ala. n. s. 425; *Fitzpatrick v. Cottingham*, 14 Wisc. 219.

¹⁰⁶ *Beale v. Hayes*, 5 Sandf. N. Y. 640; *Gower v. Carter*, 3 Iowa, 244.

¹⁰⁷ *Bagley v. Peddie*, 5 Sandf. N. Y. 192; *Heard v. Bowers*, 23 Pick. Mass. 455; *Gower v. Saltmarsh*, 11 Mo. 271; *Hammer v. Breidenbach*, 31 Mo. 49. But see *Clement v. Cash*, 21 N. Y. 253.

is possible for full compensation to be made, and the only compensation in case of liquidated damages is to pay them.¹⁰⁸

767. A penal clause will be considered as ascertaining liquidated damages in the following cases:

When the damages are uncertain and not capable of being ascertained by any known rule, whether the uncertainty lies in the nature of the subject matter itself, or in the peculiar circumstances of the case.¹⁰⁹

When, from the nature of the case and the tenor of the agreement, it is clear that the damages have been the subject of a fair calculation and adjustment between the parties.¹¹⁰

768. The force of the penalty remains unaffected, although the condition may have been partially performed; as, in a case where a penalty was one thousand dollars, and the condition was to pay an annuity of one hundred dollars which had been paid for ten years; the penalty was still valid.¹¹¹

769. After having taken a general view of the different kinds of lawful agreements, it will be proper here to consider those which are *illegal* and *fraudulent*.

When things which are illegal, both by the natural and by the civil law, are the object of an agreement, as to kill a man, it is evident that they cannot form the object or the matter of a contract, and that no one can lawfully bind himself to perform them. It is a crime to promise or agree to perform such an act, a greater to execute it. The contract is therefore null; and so far from being compelled to keep his engagement, the promissor is bound to refuse, and the law will not aid either party to complete or fulfil such a contract; on the contrary, the common law maxim is, *ex turpi contractu oritur non actio*. And if the contract has been executed, and the consideration for doing the unlawful act has been paid, he who paid it cannot recover it back. When the parties are both in fault, the preference is given to the possessor. This is the rule of the Roman law. *Si et dantis et accipientis turpis causa sit, possessorem potius esse, et ideo repetitionem cessare.*¹¹² The general rule is, that neither courts of law nor equity will interpose to grant relief to the parties when an illegal agreement has been made, and both parties are *in pari delicto*. The law leaves them where it finds them, according to the maxim, *In pari delicto potior est conditio defendentis et possidentis.*¹¹³

To this rule there are some exceptions: when a contract has been executed in despite of a statute or rule of public policy prohibiting it, relief will be granted in some cases, not only by setting aside the agreement, but by ordering a repayment of money under it. But relief will never be granted when the parties are *in pari delicto*, except to promote public policy. In these cases it is not the benefit of the party, but of the public, which is regarded.¹¹⁴

Though formerly a distinction was made between *mala prohibita* and *mala*

¹⁰⁸ *Skinner v. Dayton*, 2 Johns. Ch. N. Y. 534; Story, Eq. Jur. § 1314.

¹⁰⁹ *Bright v. Howland*, 4 Miss. 398; *Dakin v. Williams*, 17 Wend. N. Y. 447; *Brewster v. Edgerly*, 13 N. H. 278; *Grasselli v. Lowden*, 11 Ohio St. 349; *Pierce v. Jung*, 10 Wisc. 30; *Chase v. Allen*, 13 Gray, Mass. 42; *Fisk v. Fowler*, 10 Cal. 512.

¹¹⁰ 2 Greenleaf, Ev. § 259; 2 Story, Eq. Jur. § 1318; *Pearsan v. Williams*, 24 Wend. N. Y. 244; 26 Wend. N. Y. 630; *Gammond v. Howe*, 14 Me. 250; *Leland v. Stone*, 10 Mass. 459; *Mead v. Wheeler*, 13 N. H. 351; *Brooks v. Hubbard*, 3 Conn. 58; *Hall v. Crowley*, 5 All. Mass. 304; *Dunlop v. Gregory*, 10 N. Y. 241.

¹¹¹ *Blackmer v. Admr. of Blackmer*, 5 Vt. 355.

¹¹² Dig. 12, 5, 8.

¹¹³ *Phelps v. Decker*, 10 Mass. 274; *Wyman v. Fiske*, 3 All. Mass. 238. See the copy of a bill filed by a highwayman against another, to compel him to account for the profits of robberies committed on joint account. 2 Pothier, Obl. by Evans.

¹¹⁴ See *Newbold v. Sims*, 2 Serg. & R. Penn. 317.

in *se*, no such distinction prevails now; every act is considered to be illegal in itself which is expressly forbidden, either by statute or otherwise;¹¹⁵ and the law is the same, although the statute may not declare the contract to be void.¹¹⁶

Illegal contracts are void at common law, and because they are so declared by statute.

770. The *contracts void at common law* are: those which are void on account of their immorality; those contrary to public policy; and those which are fraudulent.

771. The object of the law is the promotion of good morals and the general happiness; it will not, therefore, give its sanction to illicit cohabitation, and a contract which is made in consideration of such cohabitation is void.¹¹⁷ A great distinction, however, must be perceived between a contract which has for its object such a violation of the law and one which is intended to repair any injury which may have arisen in consequence of a previous breach of the law in this respect. A contract in consideration of future illicit intercourse is void, but one made under seal to repair the injury done is valid,¹¹⁸ a sealed contract requiring no consideration; but a parol agreement, to compensate for past illicit cohabitation, is void for want of consideration.¹¹⁹ Nor can such an agreement be enforced under color of a claim for wages.¹²⁰

So all contracts in relation to the sale or publication of obscene or immoral works are void.

With the same object of promoting morality, contracts made with a woman by letting her a house for the purpose of prostitution, and from the profits of which the rent was to be paid,¹²¹ or furnishing her with goods to enable her to carry on her unlawful course, and out of the profits to pay for them,¹²² are void.

772. A contract made in relation to a libel will not be enforced; a contract for the sale of libellous pictures,¹²³ or for printing a libellous book,¹²⁴ because the publication of a libel is a misdemeanor.

773. The law aims at promoting the public good, and whatever encourages public morals, in the interests of society generally, is considered as being the object of public policy. Whatever contract is made which would *violate public policy* if enforced, is therefore void. Among the contracts which are in violation of public policy may be classed the following: those which are in restraint of trade, or lawful marriage; or which concern marriage brokerage; or wagers and gaming; or trading with a public enemy; or lending money on usury; or a contract made against public duty.

774. An agreement which is intended to bind one of the parties not to practice a particular trade at any time or place is void, as being in *restraint of trade*.¹²⁵

But an agreement which is only a particular restraint of trade may be valid;

¹¹⁵ *Bank of U. S. v. Owens*, 2 Pet. 538; *Wales v. Brooks*, 3 Ves. Ch. 612; *Aubert v. Maze*, 2 Bos. & P. 374.

¹¹⁶ *Seidenbender v. Charles*, 4 Serg. & R. Penn. 159; *Mitchell v. Smith*, 1 Binn. Penn. 118; 17 Vt. 105. But see *Strong v. Darling*, 9 Ohio, 201.

¹¹⁷ *Winnibiner v. Weisiger*, 3 T. B. Monr. Ky. 35; *Trovinger v. McBurney*, 5 Cow. N. Y. 253; *Sherman v. Barrett*, 1 McMull, So. C. 147.

¹¹⁸ *Story*, Eq. Jur. § 296; *Bacon*, Abr. *Obligations* (E); *Gibson v. Dickie*, 3 Maule & S. 463; *Binnington v. Wallis*, 4 Barnew. & Ald. 659; *Whaley v. Norton*, 1 Vern. Ch. 483; *Matthew v. Hanbury*, 2 Vern. Ch. 187.

¹¹⁹ *Beaumont v. Reeve*, 8 Q. B. 483.

¹²⁰ *Robbins v. Potter*, 11 All. Mass. 588.

¹²¹ *Girardy v. Richardson*, 1 Esp. 13; *Crisp v. Churchill*, cited in 1 Bos. & P. 340.

¹²² *Jennings v. Throgmorton*, Ry. & M. 251.

¹²³ *Forbes v. Johnes*, 4 Esp. 97.

¹²⁴ *Gale v. Leckie*, 2 Stark. 107.

¹²⁵ *India Ass. v. Rock*, 14 La. Ann. 168.

to ensure its validity it must be partial only; it must be founded upon a valuable consideration, and it must be reasonable and not oppressive.¹²⁶

In these contracts the courts will inquire into the validity of the consideration, though the contract be under seal.¹²⁷

To show an agreement to be in partial and not total restraint of trade, it is not enough that the place covered by the contract shall be actually limited. It is to be decided upon all the circumstances of the case whether the agreement does to all practical intents and purposes operate as a total restraint. Thus an agreement not to carry on a business in the state of Massachusetts is void.¹²⁸ Or it may rest upon the question whether the agreement does more than protect the interest of the party.¹²⁹

The rule which considers a contract made in restraint of trade to be void does not apply to cases where the party who agrees to the restraint sells a secret of art, binding himself not to use it, or conveys a patent right to another, who is afterward to have the sole use of the invention.¹³⁰

775. A contract in restraint of marriage, by which one of the parties is bound not to marry at all, or to marry a person who is not reciprocally bound to marry the obligor, is void,¹³¹ for it is the interest of society that all persons should be left free to marry. And a condition in a devise that the devisee shall not marry is void, if the condition be subsequent; but if it be a precedent condition, the devisee will not be entitled to the devise unless the condition has been performed.¹³²

776. Marriage brokerage contracts are void.¹³³ By marriage brokerage is meant the act by which a person interferes, for a consideration to be received by him, between a man and a woman for the purpose of promoting a marriage between them; the money paid for such service is also called by this name.

777. Wagers and gaming on indifferent subjects are lawful by the common law of England, and such is held to be the law in some of the states,¹³⁴ while some courts hold all wagers unlawful.¹³⁵

But all wagers contrary to public policy or to statutes are void. Thus wagers on the result of an election are void.¹³⁶ So also wagers which tend to affect the feelings or interests of third persons, or wantonly expose a third person to ridicule or improper imputation, or operate as libels, are void.¹³⁷

778. Trading with an enemy is unlawful, and in general contracts made with him are void, for it cannot be allowed that the two governments are at war and enemies, and individuals belonging to them are at peace.¹³⁸ Partnerships existing between citizens or subjects of two nations which become enemies are dis-

¹²⁶ Grasselli v. Lowden, 11 Ohio, St. 349.

¹²⁷ Pierce v. Fuller, 8 Mass. 223.

¹²⁸ Taylor v. Blanchard, 18 All. Mass.

¹²⁹ Mallan v. May, 11 Mees. & W. Exch. 653.

¹³⁰ Bryson v. Whitehead, 1 Sim. & S. Ch. 74; Vickery v. Welch, 19 Pick. Mass. 526.

¹³¹ Baker v. White, 2 Vern. Ch. 215; 1 Story, Eq. Jur. § 277; Low v. Peers, Wilm. 364, 4 Burr. 2225; Cock v. Richards, 10 Ves. Ch. 429; Sterling v. Sinnickson, 2 South. N. J. 756.

¹³² 1 Story, Eq. Jur. § 288; Coke, Litt. 206.

¹³³ Fonblanque, Eq. b. 1, c. 4, s. 10, note (s); 1 Story, Eq. Jur. § 263; Newland, Contr. 469; Boynton v. Hubbard, 7 Mass. 118; Roberts v. Roberts, 3 P. Will. Ch. 74, n.

¹³⁴ Johnson v. Fall, 6 Cal. 359; Bass v. Peevey, 22 Tex. 295; Ross v. Green, 4 Harr. Del. 308.

¹³⁵ Perkins v. Eaton, 3 N. H. 155; Ball v. Gilbert, 12 Metc. Mass. 397.

¹³⁶ M'Alister v. Hoffman, 16 Serg. & R. Penn. 147; Hickerson v. Benson, 8 Miss. 8; Ball v. Gilbert, 12 Metc. Mass. 397; Tarleton v. Baker, 18 Vt. 9; Wheeler v. Spencer, 15 Conn. 28; Stoddard v. Martin, 1 R. I. 1; Gardner v. Nolen, 3 Harr. Del. 420.

¹³⁷ Phillips v. Ives, 1 Rawle, Penn. 37.

¹³⁸ Griswold v. Waddington, 15 Johns. N. Y. 57; 16 Id. 438; Cargo of the Emulous, 1 Gall. C. C. 571.

solved by a war between them. To this general rule, that trading with an enemy makes the contract void, there are several exceptions.

When parties have a license from their respective governments, but in such cases they must confine themselves strictly within the limits of the license given.

When the party dealing with an enemy does not know that he is such: in this case he may enforce his contract after the peace.

When the contract is made from necessity. Ransom bills, which are bills made by the master of a captured vessel during war in favor of the conqueror, on condition that he will let the vanquished ship depart and give him a safe-conduct, will be valid, unless positively restricted by some special law.¹³⁰ Other contracts made with an enemy from necessity will also be valid.¹⁴⁰

779. *Usurious contracts* are unlawful, and in some states they are void. Usury is the illegal profit which is required by the lender of a sum of money, from the borrower, for its use. To constitute a usurious contract the following circumstances are requisite: a loan of money; an agreement that the money lent shall be returned at all events; and that more than legal interest shall be paid.

There must be a loan of money in contemplation of the parties, and if there be a loan, however disguised, it is sufficient; but a *bona fide* sale of a bill of exchange or promissory note is not usurious, although it may be sold below its value.

There must be an agreement that the principal shall be returned at all events, for if the return depend upon a contingency, there can be no usury; as, in the cases of insurance, annuities, and bottomry, which are all lawful, whatever rate of interest may be charged, if there is no fraud.

The agreement must be to take more than lawful interest for the use of the money. There must be an agreement to take such unlawful interest, for a mistake in fact, as the making a miscalculation, will not render the contract usurious so as to avoid it, but the debtor will be relieved as to the surplus. A mistake of law will not, however, excuse the lender, because every one is bound to know the law.¹⁴¹ As to the amount of interest which may be taken, it may be stated that any amount not allowed by the law of the place where the contract is made will render the contract usurious, and if void there, it will be void everywhere. Any interest, however exorbitant, which can be lawfully charged at the place where the contract was made, will not be usury.

780. Contracts made in consideration of the party committing an *indictable offence*, or to induce him to do so, are void; as, where the consideration is the commission of an assault and battery, the publication of a libel, or the compounding of a felony.¹⁴²

All contracts which are founded on a violation of public trust and confidence,¹⁴³ and agreements for the maintenance of suits, or for champerty,¹⁴⁴ embracery,¹⁴⁵ bribery and extortion,¹⁴⁶ are void.

All contracts to obstruct the course of justice, or to induce public officials to misbehave,¹⁴⁷ all improper bail bonds taken for favor, and all promises to induce the taking of such bonds, are void.

¹³⁰ 1 Kent, Comm. 105, 4th ed.; *Maissenaire v. Keating*, 2 Gall. C. C. 336.

¹⁴⁰ Story, *Bills*, § 101, 103; Bayley, *Bills*, c. 2, s. 9; 6 Taunt. 237; 8 Term, 548.

¹⁴¹ *Lloyd v. Scott*, 4 Pet. 205; Comyn, *Usury*, s. 2; *Buckley v. Guidland*, Croke, Jac. 678.

¹⁴² *Commonwealth v. Pease*, 16 Mass. 91.

¹⁴³ *Fuller v. Dame*, 18 Pick. Mass. 472; *Vauxhall Bridge v. Earl Spencer*, 2 Madd. Ch. 356.

¹⁴⁴ *Thurston v. Percival*, 1 Pick. Mass. 415; *Beldin v. Pitkin*, 2 Caines, N. Y. 147.

¹⁴⁵ 4 Sharswood, Blackst. Comm. 140.

¹⁴⁶ *Commonwealth v. Bagley*, 7 Pick. Mass. 279.

¹⁴⁷ *Cook v. Shipman*, 24 Ill. 614.

Agreements to indemnify a public officer for doing an illegal act are void.¹⁴⁸ But an agreement to indemnify for an unlawful act already done is valid.¹⁴⁹

Promises to induce a party not to compete for public contracts to be awarded to the lowest bidder are void.¹⁵⁰ Agreements to use improper means, such as personal influence and solicitation, commonly called lobbying, to procure an act of the legislature, are void,¹⁵¹ but a contract to act as attorney for petitioners before the legislature is lawful.¹⁵²

It is contrary to public policy to enforce agreements to pay seamen increased wages for work in danger,¹⁵³ or promises to pay witnesses or public officers more than their legal fees.

It is proper for parties to a civil suit to settle it without trial, but a criminal action is not a subject of settlement, and any agreements to that effect are void; so an agreement that the defendant in a suit for divorce shall make no defence is void.¹⁵⁴

781. To obtain justice is the object of the law; consequently *fraud* is what it most abhors, and if any contract be tainted with fraud it declares it void, whatever may be the form in which it may be clothed. But when performed, the contract will be binding on the party who has been guilty of the fraud if the other party insists, because no one is allowed to take advantage of his own wrong.¹⁵⁵

Indeed, a contract by which a party should agree that it should be valid notwithstanding a fraud, would be void.¹⁵⁶ By fraud is meant any trick or contrivance employed by one person to induce another to fall into an error, or to detain him in it so that he may make an agreement contrary to his interest. The fraud may consist either in the misrepresentation or in the concealment of a material fact, and these form the essentials of fraud. And in addition to fraud between the parties, a contract may be tainted with fraud as to third persons.

782. *Misrepresentation* is the statement made by one party to a contract to the other, that a thing relating to it is in fact in a particular way, when he does not know it is so, and in truth it is not as represented. In order to avoid the contract the representation must have been both false and fraudulent; and when a man asserts that to be true which he does not know to be so, and which in fact is false, he is guilty of stating a falsehood which bears all the features of fraud.¹⁵⁷ The fraud must work an injury, for damage without fraud or fraud without damage is not sufficient to give a cause of action.¹⁵⁸ But every misstatement will not be considered fraudulent so as to avoid the contract; when a misrepresentation has been made without fraud respecting a matter which the person to whom a communication was made, and who had an interest in it,

¹⁴⁸ Doty v. Wilson, 15 Johns. N. Y. 381; Kneeland v. Rogers, 2 Hall, N. Y. 579; Hodson v. Wilkins, 7 Me. 113.

¹⁴⁹ Hall v. Huntoon, 17 Vt. 244.

¹⁵⁰ Swan v. Chorpenning, 20 Cal. 182.

¹⁵¹ Powers v. Skinner, 34 Vt. 274; Brown v. Brown, 34 Barb. N. Y. 533.

¹⁵² Marshall v. Baltimore R. R. Co., 16 How. 314; Frost v. Belmont, 6 All. Mass. 152; Bryan v. Reynolds, 5 Wisc. 200; Clippinger v. Hepbaugh, 5 Watts & S. Penn. 315.

¹⁵³ Bartlett v. Wyman, 14 Johns. N. Y. 260; Frazer v. Hatton, 2 C. B. N. s. 512.

¹⁵⁴ Stoutenburg v. Lybrand, 13 Ohio St. 228.

¹⁵⁵ Steel v. Brown, 1 Taunt. 381; Taylor v. Weld, 5 Mass. 116; Deady v. Harrison, 1 Stark. 60.

¹⁵⁶ Clef des Lois Romaines, verbo Dol.

¹⁵⁷ Schneider v. Heath, 3 Campb. 506; Adamson v. Jarvis, 4 Bingh. 66; 3 Conn. 413; Cochran v. Cummings, 4 Dall. 250.

It is as much a fraud in selling land to assert that which is not known to be true as to assert what is known not to be true. Bennett v. Judson, 21 N. Y. 238. But a misrepresentation will not avoid a contract on the ground of fraud if the party making the statement believed it to be true. Mason v. Chappell, 15 Gratt. Va. 572; Peers v. Davis, 29 Miss. 184; Zehner v. Kepler, 16 Ind. 290.

¹⁵⁸ 3 Bulstr. 95.

should not have taken upon trust, but was bound to inquire into himself, and had the means of ascertaining the truth thereof, there would be no responsibility.¹⁵⁹ Nor will such a misrepresentation be sufficient to set aside the contract when the party was not deceived; as if the seller of a piece of cloth should represent it to be black when in fact it was gray, and the buyer saw it. And on the other hand, the representation may appear to be true, but if false in fact it will make the party responsible; as when a man wanted credit and represented he was worth a certain sum of money of his own property, and referred to his father, and, on being asked, the father said he was, when in truth he had lent him the money, the father was held responsible for the false representation.¹⁶⁰

783. *Concealment* is the unlawful suppression of any fact or circumstance, by one of the parties to a contract, from the other, and which in justice ought to be made known.¹⁶¹ It is only when the party is bound in justice to divulge the fact that silence or concealment is fraudulent; for the general rule is, in other cases, that mere silence will not avoid the contract, although it may operate as an injury to the party from whom the fact is concealed.

Thus a vendor must employ no artifice or disguise to prevent defects being known, yet under the maxim of *caveat emptor* he need not disclose all facts known to him, though the vendee may have no knowledge of them. In general all extrinsic circumstances are supposed to lie equally within the knowledge of both parties, and there is no obligation to disclose them.¹⁶²

As to intrinsic circumstances, if they are such that the other party might by proper diligence have discovered them, they need not be disclosed. But latent defects lie peculiarly within the sphere of knowledge of the vendor, and upon him lies the obligation of disclosing them.¹⁶³

So the circumstances of the case may show that a special trust was placed in one party, who must then make all necessary disclosures. Thus a defect may be patent and obvious, and yet the vendee may justifiably buy without inspection, relying on the vendor. What will justify this trust will depend on the particular circumstances of each case.¹⁶⁴

784. When treating of the effect of agreements with regard to third persons the effect of fraud on such third persons as affecting the validity of contracts was considered; it is not requisite that it should be again examined here.¹⁶⁵

785. *Contracts in violation of a statute* are utterly void, whether the subject matter or the consideration of the contract be forbidden by law. Sometimes a statute expressly prohibits or enjoins an act; at other times the act is prohibited by implication only; in either case a contract in violation of its provision is void.¹⁶⁶ Thus a contract is void if the statute merely affixes a penalty to it.¹⁶⁷

So all contracts made in violation of a statute which forbids all ordinary or

¹⁵⁹ 1 Chitty, Pract. 836. It is a general rule that a misrepresentation will not avoid a contract where both parties have equal opportunities of ascertaining the truth, and the fact misrepresented does not lie especially within the knowledge of one; the law will not interfere to protect a party from the consequences of his own negligence. *Bell v. Byerson*, 11 Iowa, 118; *Blen v. Bear River Co.*, 20 Cal. 602; *Gatling v. Newell*, 12 Ind. 118; *Jenkins v. Long*, 19 Ind. 28.

¹⁶⁰ *Cobbett v. Brown*, 5 Bingh. 85.

¹⁶¹ *Fonblanque*, Eq. B. 1, c. 3, § 4 (n); 1 Story, Eq. Jur. § 207.

¹⁶² *Laidlaw v. Organ*, 2 Wheat. 178; *Otis v. Raymond*, 3 Conn. 413; *Van Arsdale v. Howard*, 5 Ala. N. S. 596.

¹⁶³ *Cecil v. Spurger*, 32 Miss. 462; *Hadley v. Clinton Co.*, 13 Ohio St. 502.

¹⁶⁴ *Matthews v. Bliss*, 22 Pick. Mass. 53.

¹⁶⁵ Before, 670.

¹⁶⁶ *Etna Ins. Co. v. Harvey*, 11 Wisc. 394; *Stanley v. Nelson*, 28 Ala. N. S. 514; *Siter v. Sheets*, 7 Ind. 132.

¹⁶⁷ *Nichols v. Ruggles*, 3 Day, Conn. 145; *Brackett v. Hoyt*, 29 N. H. 264.

secular work on Sunday are void.¹⁶⁶ These statutes usually apply only to labor in a person's ordinary calling, and many contracts out of the ordinary course of business are held valid, though made on Sunday;¹⁶⁹ but the statutes and the rules of interpretation vary widely in the different states. But to render the contract void, it must itself violate the provisions of the statute, for if it be only connected with some incidental matter which is illegal, and is not itself in violation of the terms of the statute, it will be valid; for example where A sells goods without obtaining a license, it is held that he may recover the price, the sale being independent of the illegality.¹⁷⁰ So when an illegal act has been committed, a subsequent agreement founded thereon, but forming no part of the consideration of the illegal act, is valid.¹⁷¹

786. Sometimes a contract is made between two parties to enable one of them to violate the provisions of a statute, and sometimes an act is done by one without any agreement as to the violation of the statute which enables the other to break a penal law, as when a man lends another money to lay an unlawful wager. In such case, if the lender lends it to enable the borrower to lay the wager on condition he shall so lay it, the transaction is unlawful; but if it be lent without any such understanding, and afterward the borrower uses it to lay the unlawful wager, then the loan is lawful, it being a rule that when the plaintiff can make out his case without showing that he violated the law, he shall recover.¹⁷²

787. Some statutes are directly prohibitory, and their provisions are conditions precedent, directly affecting the contract; others, on the contrary, are merely directory in their terms, and these terms, when not complied with, are only collateral to the agreement; in these last the contract is not void. For example, the law requires that the assignment of a patent or a deed of conveyance shall be recorded, yet if be not done the assignment in the one case or the deed in the other will not be void as between the parties.¹⁷³

788. When the contract is entire and any part of it is unlawful, the whole is void; but if the agreement be to do two acts for a sufficient and lawful consideration, and one of them be void and capable of separation from the other acts which are lawful, the contract is binding as to the latter acts and void for the remainder. And it matters not whether the part which is void be declared so by statute or made so by the common law, unless indeed the statute declares expressly such a contract to be void,¹⁷⁴ though once the contrary doctrine was entertained, and it was said that when a contract violated a statute, although it was divisible, it was void.¹⁷⁵

¹⁶⁶ *State v. Suhur*, 33 Me. 539; *Fox v. Abel*, 2 Conn. 560; *Adams v. Gay*, 19 Vt. 358; *Smith v. Foster*, 41 N. H. 215; *Bosley v. McAllister*, 13 Ind. 565; *Robeson v. French*, 12 Metc. Mass. 24.

¹⁶⁹ *Sanders v. Johnson*, 29 Ga. 526; *Kaufmann v. Hamm*, 30 Mo. 387; *Smith v. Wilcox*, 24 N. Y. 353; *Kiger v. Coats*, 18 Ind. 153.

¹⁷⁰ *Johnson v. Hudson*, 11 East. 180; *Wetherell v. Jones*, 3 Barnew. & Ad. 221.

¹⁷¹ *Armstrong v. Toler*, 11 Wheat. 258; *The George*, 2 Wheat. 278.

¹⁷² *Swan v. Scott*, 11 Serg. & R. Penn. 155; *Thomas v. Brady*, 10 Penn. St. 170; *Faikney v. Reynous*, 4 Burr. 2069; *Petrie v. Haney*, 3 Term, 419; *Carsan v. Rambert*, 2 Bay, So. C. 560; *Barjeau v. Walmsley*, 2 Strange, 1249.

¹⁷³ *Brooks v. Byam*, 2 Stor. C. C. 542.

¹⁷⁴ *Mouys v. Leake*, 8 Term, 411; *Doe v. Pitcher*, 6 Taunt. 359. This is now universally the law. Chancellor Kent says: "Where any matter, void even by statute, be mixed up with good matter, which is entirely independent of it, the good part shall stand, and the rest be held void." 2 Kent, Comm. 1st ed. 468, 10th ed. 639. This rule has been applied to contracts coming within the statute of frauds. *Rand v. Mather*, 11 Cush. Mass. 1; *Beard v. Dennis*, 6 Ind. 200; *Wood v. Benson*, 2 Crompt. & J. Exch. 94.

¹⁷⁵ *Norton v. Simms*, Hob. 14.

CHAPTER V.

EXTINCTION OF OBLIGATIONS

- 790. Different ways of extinguishing contracts.
- 791-805. Extinction by acts of both parties.
- 792-797. By release.
 - 793. Form of release.
 - 794. Kinds of release.
 - 795. Effect of a release.
 - 796. By whom a release must be made.
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- 800. Extinction by renewal.
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- 807-835. Payment.
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- 867. Fraud.
- 868. Bar by lapse of time.
- 869. Bar from arrest of defendant.
- 870. Bankruptcy.

789. Having explained how agreements are formed, what is required for their validity, what things may be the subject of agreements, what are their effects, their different kinds and their modification, we will next consider how they are extinguished.

790. There are numerous ways of extinguishing or annulling agreements, either in whole or in part. They may be reduced to the following:

By the mutual consent of the parties, under which class may be placed: release; compromise; renewal of the obligation, either by the debtor himself, called a novation, or by a third person, called a delegation; accord and satisfaction;

Sometimes by one of the parties alone, when one has the power to declare the contract at an end;

The accomplishment of the obligation or payment;

By confusion, when the duty to pay and the right to receive is in the same person;

By the loss of the thing;

By judgment, or an award which declares the contract null;

By the death of the creditor or the debtor;

By set-off, or defalcation;

By lapse of time;

By neglect to give notice;

By legal bars.

791. It is evident that the parties may at any time change their contract by mutual consent, for although the agreement is a law to them, it is subject to their joint will to annul, change or modify it, as it was to make it. A contract may be extinguished by the acts of the parties in several ways.

792. A debt, obligation or engagement may be extinguished by a release. A *release* is a discharge of a right of action, which the releasor has against the releasee. Releases may be considered: as to their form; their different kinds; their effect; by whom they are to be made; and to whom.

793. The operative words of a release are *remise, release, quit-claim, discharge, and acquit*; but other words will answer the purpose.¹

The subject which is to be released must be specially mentioned, or such general terms must be used that they include it. Littleton says a release of all demands is the best and strongest release.² Lord Coke, on the contrary, says *claims* is a stronger word.³

A *covenant not to sue* has, in general, the effect of a release, as between the covenantor and the covenantee; but it does not operate as a release to the joint obligors with the covenantee, they being liable as if it had not been given.⁴

A contract, whether under seal or not, may be discharged by a *parol release*

¹ Sid. 265; Croke, Jac. 696; 9 Coke, 52.

² Littleton, § 508.

³ Coke, Litt. 291, b.

⁴ Crane v. Alling, 3 Green, N. J. 423; Durell v. Wendell, 8 N. H. 369.

before there has been a breach of the contract.⁵ But after breach the release must be under seal;⁶ for a mere parol release, without payment or satisfaction, does not, like a release under seal, import any consideration.⁷

794. Releases are either express or implied. *Express* releases are made by deed, by which the creditor distinctly discharges the debtor from all obligation. A release may be *implied* from the acts of the creditor; as, when he releases one of two joint obligors or joint debtors, the law presumes he intends to discharge both, because if one only were discharged, and a recovery should be had against the other, the latter could claim contribution from the one who had been discharged, and thus, circuitously, he could be made to pay the debt, or a part of it, from which he had been released. A release will also be implied where the creditor delivers to the debtor the obligation he holds against him; he will be presumed to have given him the debt. When a debtor has pledged an article as security for the debt, the return of the pledge to the debtor will not be presumed as a release of the debt.

A release arises where the parties assume a new relation inconsistent with that of debtor and creditor, as where they marry; or where the creditor takes a higher security as a bond, in place of a parol contract.⁸ So a fraudulent and material alteration in a written or sealed contract by one party releases the other.⁹ An alteration by a stranger to the contract has no such effect.¹⁰

795. A release has the effect to discharge the releasee and all persons who are jointly bound to the releasor with him, also all their heirs, executors and administrators, and all their joint and several estates. After a release has been made the releasee may be a witness, if there is no other cause for his being rejected but his interest.

In general a release will be restrained by the particular occasion of giving it;¹¹ for example, a release by the creditor will discharge all demands which are mentioned in it as being due or owing by the debtor to the creditor in his own right, but will not extend to demands due him as executor, unless they are expressly stated.¹² And where a particular debt is mentioned in the recital, a general release following will only discharge the debt recited.¹³

796. The creditor has alone the power to make a release in his own right. None but he can discharge the obligation; but he may do this personally or by his agent.

A release by one partner of the firm binds all the partners;¹⁴ and so a release by one of several joint creditors will bind them all;¹⁵ and a release by a

⁵ *Wentz v. Dehaven*, 1 Serg. & R. Penn. 212; *Whitehill v. Wilson*, 3 Penn. 405; *Shaw v. Pratt*, 22 Pick. Mass. 308; *Dearborn v. Cross*, 7 Cow. N. Y. 48; *Delacroix v. Bulkley*, 13 Wend. N. Y. 71.

⁶ *Bender v. Sampson*, 11 Mass. 42; *Johnson v. Kerr*, 1 Serg. & R. Penn. 25; *Buller, Nisi Prius*, 152.

⁷ *Sigourney v. Sibley*, 21 Pick. Mass. 101; *Miller v. Hemler*, 5 Watts & S. Penn. 486.

⁸ *Banorgee v. Hovey*, 5 Mass. 11; *Ward v. Johnson*, 13 Mass. 148; *Jones v. Johnson*, 3 Watts & S. Penn. 276.

⁹ *Martendale v. Follett*, 1 N. H. 95; *Adams v. Frye*, 3 Metc. Mass. 103; *Marshall v. Gougler*, 10 Serg. & R. Penn. 164; *Langdon v. Paul*, 20 Vt. 217; *Thornton v. Appleton*, 29 Me. 298.

¹⁰ *United States v. Spalding*, 2 Mas. C. C. 482.

¹¹ 3 Lev. 273; *Palm*, 218.

¹² *Wiggins v. Norton*, R. M. Charlt. Ga. 15.

¹³ *Lyman v. Clarke*, 9 Mass. 235; *Wilkes v. Ferris*, 5 Johns. N. Y. 345; *Payler v. Homersham*, 4 Maule & S. 423.

¹⁴ *Pierson v. Hooker*, 3 Johns. N. Y. 68; *Salmon v. Davis*, 4 Binn. Penn. 375.

¹⁵ *Kimball v. Wilson*, 3 N. H. 96; *Halsey v. Whitney*, 4 Mas. C. C. 206; *Decker v. Livingston*, 15 Johns. N. Y. 479; *Murray v. Blatchford*, 1 Wend. N. Y. 583; *Austin v. Hall*, 13 Johns. N. Y. 286.

husband, for the personal abuse of his wife, is a good bar to the joint action of the husband and wife for the same cause.¹⁶

But a person who has a beneficial or equitable interest only in the contract cannot release so as to bind the party having the legal interest. And *e converso* the *cestui que trust* may set aside a release by his trustee if prejudicial to him and made without his knowledge or consent.¹⁷ So one who is merely a nominal party to a suit cannot release to the prejudice of the others;¹⁸ and a release will be set aside where there is collusion between the releasor and releasee to the prejudice of joint creditors.

797. It is evident that a release can be made to the debtor only; it is however considered as made to him, although it may be to his guardian, committee, tutor, curator, or other person lawfully representing him.

When there are several joint debtors a release to one will be a release to them all,¹⁹ but then the release must be under seal.²⁰

A release by parol to one debtor does not discharge the others;²¹ nor does a covenant not to sue one debtor release the others.²²

798. The parties, as has been already observed, may change or alter their contracts; they may, therefore, where there is a claim of right on one side and denial upon the other, settle the matter in dispute by a *compromise*, which is an agreement between two or more persons, who, to avoid a law suit, amicably settle their differences, on such terms as they can agree upon.

799. The following are the principal points relating to compromise:

Its *form*, which may be in writing or not in writing; if in writing, it may be under seal or not under seal.

The *subject* of the compromise must be something uncertain, for if it be certain, a payment of a part will not discharge the rest, for want of a consideration. The compromise of a doubtful claim is a good consideration to uphold the contract, and the merits and demerits of the several claimants will not be investigated for the purpose of setting aside a compromise otherwise fairly made.²³

A compromise will be sustained in settlement of a claim made in good faith under color of right though there is in fact no right.²⁴ Where legatees agree upon the interpretation of a will and settle the estate accordingly, the court will not set aside the settlement though the interpretation be erroneous.²⁵

As to the *parties*, it must be made by one having a right and capacity to enter into the contract. When there is but one person on each side, it must be made by him or his authorized agent.

A compromise may be made by a partner so as to bind the firm; and though a partner cannot in general enter into a contract under seal, by which he will

¹⁶ Southworth v. Packard, 7 Mass. 95.

¹⁷ Eastman v. Wright, 6 Pick. Mass. 323; Herbert v. Pigott, 2 Crompt. & M. Exch. 384.

¹⁸ Rawstorne v. Gandell, 15 Mees. & W. Exch. 304.

¹⁹ United States v. Thompson, Gilp. Dist. Ct. 614; Bunson v. Kincaid, 3 Penn. 57; Wilings v. Consequa, Pet. C. C. 301. But see Blakey v. Blakey, 2 Dan. Ky. 460.

²⁰ Shaw v. Pratt, 22 Pick. Mass. 305; Smith v. Bartholomew, 1 Metc. Mass. 276; Brooks v. Stuart, 9 Ad. & E. 854.

²¹ Shaw v. Pratt, 22 Pick. Mass. 308; Pond v. Williams, 1 Gray, Mass. 630; Walker v. McCulloch, 4 Me. 421; Harrison v. Close, 2 Johns. N. Y. 448; Rowley v. Stoddard, 7 Johns. N. Y. 209.

²² Tuckerman v. Newhall, 17 Mass. 583.

²³ Union Bank v. Geary, 5 Pet. 114; Fisher v. May, 2 Bibb, Ky. 449; Worrall's Accounts, 5 Watts & S. Penn. 111; Hoge v. Hoge, 1 Watts, Penn. 216, 217; O'Keson v. Barclay, 2 Penn. 531; Tuttle v. Tuttle, 12 Metc. Mass. 551; Stockton v. Frey, 4 Gill, Md. 406.

²⁴ Gates v. Shutts, 7 Mich. 127.

²⁵ Follmer's Appeal, 37 Penn. St. 121; Owen v. Hancock, 1 Head, Tenn. 563.

bind the firm to perform certain acts, yet he may release or compromise an obligation under seal, where the firm have no act to perform.²⁶

Without a special authority, an attorney has no right, strictly speaking, to make a compromise for his client; yet the court will not be inclined to disturb such a compromise when there has been no fraud nor surprise,²⁷ particularly when the principal has acquiesced in it for years.²⁸

As to its *effect*, the compromise puts an end to the suit, if it be proceeding, and bars any suit which may be afterward instituted for the same cause. But it will be set aside by chancery, or at law, when it has been obtained by fraud or misrepresentation.²⁹

A compromise when fairly made is sustained at law and highly favored, and the courts will not go behind it.³⁰ A compromise may be conditional, as where one takes a note in settlement of a doubtful claim, making the settlement conditional on the payment of the note. A non-payment of the note reopens the settlement.

800. When a new debt is substituted by the parties for an old one, this is called in the civil law by the convenient term of *novation*. The old debt is extinguished by the act of the parties. A novation may be made in three different ways, which form three distinct kinds of novations.

801. The first takes place, without the intervention of any new person, where a debtor contracts a new engagement with his creditor, in consideration of being liberated from the former; as, if I owe to you a thousand dollars on a note which falls due on the first day of January, and I give to you a new note on that day payable on the first day of April, and you deliver to me the first note. Here is a contract by which not only the first note is discharged, but all the collateral engagements connected with it; if you had a guaranty of that note, it will not be a guaranty of the last. This kind of novation has no designating name, and is called simply novation.

The second kind of novation takes place where the debt remains the same but a new debtor is substituted. This novation may be made without the intervention or privity of the old debtor, in which case the new agreement is called *expromissio*, and the new debtor *expromissor*; or it may be by the debtor's transmission of his debt to another. This is called *delegatio*, and requires the consent of all three parties.

The third kind is where the debt remains the same but a new creditor is substituted. This also is called *delegatio*.

802. In every novation the old debt is wholly extinguished by the new one, together with all rights and liens. Thus where a security of a higher nature, as a bond, is given for a simple contract debt.³¹ Any obligation which can be destroyed at all may be destroyed by novation.

803. The term novation is rarely used at common law, but the same principles are applied to the transaction under the name of assignment or merger. Where a new creditor is substituted by an agreement of the debtor and creditor, no new promise by the debtor to the new creditor is required to enable the latter to maintain an action. There is clearly no privity of contract between them, but the courts have adopted the equitable doctrine of *assumpsit*,³² first creating a trust for the new creditor and then enforcing it at law.

²⁶ *Bruen v. Marquand*, 17 Johns. N. Y. 58; *Pierson v. Hooker*, 3 Johns. N. Y. 68; *Smith v. Stone*, 4 Gill & J. Md. 310.

²⁷ *Holker v. Parker*, 7 Cranch 436.

²⁸ *Mayer v. Foulkrod*, 4 Wash. C. C. 511.

²⁹ *Hoge v. Hoge*, 1 Watts, Penn. 163; *Anderson v. Bacon*, 1 Marsh. 51; *Mosby v. Leeds*, 3 Call. Va. 439.

³⁰ *Sowle v. Holdridge*, 17 Ind. 236; *Kelly v. Perseverance Ass.* 39 Penn. St. 148.

³¹ *Settle v. Davidson*, 7 Miss. 704; *Van Vliet v. Jones*, 1 Spenc. N. J. 340; *Gardiner v. Hurst*, 2 Rich. So. C. 601.

³² *Brewer v. Dyer*, 7 Cush. Mass. 340; *Weston v. Barker*, 12 Johns. N. Y. 281.

804. A new creditor cannot be substituted without the consent of the debtor. In the case of negotiable instruments the debtor at the inception is understood to agree to all future assignments. But if a contract not negotiable is assigned without the consent of the debtor, no obligation arises between the debtor and assignee.

The assignee is in equity entitled to all the rights of the original creditor, but the debt remains the same in character as before. And such an assignment is not a novation.

805. The fourth way of extinguishing an obligation by the act of both parties, is by *accord and satisfaction*, which is the settlement of a dispute or the satisfaction of a claim, by an executed agreement between the party injuring and the party injured.

Accord and satisfaction in some respects resemble the contract of sale; *dare in solutum, est quasi vendere*. There is, however, some difference; the contract of sale may be perfect without actual delivery of the thing sold, but accord is not sufficient without satisfaction; when a person pays what he supposed he was owing, and he does not owe so much, he may recover the excess, in an action for money had and received; not so when property other than money has been given in payment: example, I owe you truly one hundred dollars, but we both supposed the debt to be two hundred dollars; instead of paying you the money I give you a horse estimated at two hundred dollars, as an accord and satisfaction of the debt, I cannot recover the difference; on the other hand, where a debt has been discharged by accord and satisfaction for less than its amount, an action cannot be supported for the balance;³³ he who sells goods which are not in his possession does not guaranty the title,³⁴ but it would be no satisfaction unless the title to the thing actually passed.³⁵ The consideration of this subject will be resumed in the sequel.

Where there are several creditors, in general, accord and satisfaction to one is a bar to all, if the satisfaction is intended for the whole debt and not for the one creditor's share merely.³⁶ This is especially the case where one has authority to receive payment for all, though such authority may be presumed.³⁷

806. Sometimes a contract may be annulled by one of the parties, as where there is a special clause in the agreement that one of the parties shall have the power to annul the agreement within a certain time; or when it results from the nature of the contract, as when two persons are in partnership and no time is limited for its duration, either party may annul it at pleasure.

An appointment of an agent or attorney may be revoked at pleasure, unless the authority has been partly executed, or has been made for a valuable consideration and is coupled with an interest. But if the principal allows the written authority to remain in the possession of the agent, he will be liable to third parties who deal with the agent without knowledge of the revocation. So one partner will be liable for the acts of the other after dissolution, if outside parties deal with him in ignorance of the dissolution, who have a right to be informed of it.

807. The most natural way of extinguishing an obligation which a man has contracted is, doubtless, to fulfil his promise by delivering to his creditor the thing due, if the obligation consist in delivering the thing; and in fulfilling the act promised, if the obligation consist in doing a thing. This is what is called

³³ *Stafford v. Bacon*, 2 Hill, N. Y. 253; 25 Wend. N. Y. 884; *Williams v. Stanton*, 1 Root, Conn. 426; *Blinn v. Chester*, 5 Day, Conn. 360.

³⁴ *Croke*, Jac. 197.

³⁵ *Pothier, Vente*, n. 602, 604.

³⁶ *Strang v. Holmes*, 7 Cow. N. Y. 224; *Clark v. Dinsmore*, 5 N. H. 136.

³⁷ *Thompson v. Percival*, 5 Barnew. & Ald. 925; *Wallace v. Kelsall*, 7 Mees. & W. Exch. 264. See beyond 2482-2485, as to accord and satisfaction.

paying, and which the Latins energetically called *solvere*, to unbind one's self, to untie the knot or lien of the obligation: *solvere dicimus eum qui fecit quod facere promisit*. But in a more general acceptation of the word are included all manners of extinguishing obligations by which the creditor is or ought to be satisfied, and the debtor becomes free.

808. To understand this subject it will be proper to consider by whom the payment is to be made, to whom, what is to be paid, when the payment is to be made, where it is to be made, the effect of the payment, how payment is to be appropriated, effect of a tender and payment of money into court.

809. The payment may be made by the real debtor or other persons from whom the creditor has a right to demand it; an agent may make payment for his principal, and any mode of payment by the agent, accepted and received as such by the creditor as an absolute payment, will have the effect to discharge the principal, whether known or unknown, and whether it be in the usual course of business or not.

When several persons are liable for the same debt, payment may be made by any one, and it will discharge all the rest,³⁸ because the creditor is entitled to one satisfaction only.

The moment the creditor, as such, has received payment, it is clear he can have no further claim; if, therefore, a third person, a stranger, pay the debt without the consent of the debtor, but in his name, the payment will be good.³⁹

810. To be valid the payment must be made to the creditor himself, or his assigns, if known, or to some person authorized by him, either expressly or by implication.

811. By *creditor* must be understood not only the person with whom the contract was made, but also his executors, administrators and assigns.

To make a valid payment to the creditor himself, or to those who represent him, he must at the time be capable of administering his estate, he must be *sui juris*. If, therefore, the creditor was at the time of the payment either a minor or a married woman, or one found *non compos* by inquisition, a payment to him would be void, unless perhaps the money so paid had gone to the actual use of such creditor, as if it had been applied to pay his debts, which the guardian, the husband, or the committee were bound to pay.

In case the original creditor should have assigned a chose in action not assignable at law, as a book debt, or a note not negotiable, a payment to the assignor without notice of such assignment is good.⁴⁰

When the debt is due to several joint creditors, payment to one is, in general, a valid payment,⁴¹ as to one partner⁴² or executor.⁴³

812. When the payment is made to those whom the creditor has appointed to receive the money for him, it is considered as if made to himself. It therefore follows:

That it is of no consequence who the agent or attorney in fact may be, whether he be an infant or a feme covert.

That the authority given must be by one *sui juris*, for if an infant or married woman were to give a letter of attorney to receive a debt, payment to the attorney would not be good, because the debtor could not have made a valid payment to such infant or married woman.

813. The authority of an agent to receive payment is governed by the ordi-

³⁸ *Boggs v. Lancaster Bank*, 7 Watts & S. Penn. 331.

³⁹ *Harrison v. Hicks*, 10 Ala. 423. See *Keller v. Leib*, 1 Penn. 220.

⁴⁰ *Foster v. Beals*, 21 N. Y. 247.

⁴¹ *Scott v. Trent*, 1 Wash. C. C. 77; *Marrow v. Starke*, 4 J. J. Marsh. Ky. 367.

⁴² *King v. Smith*, 4 Carr. & P. 108; *Porter v. Taylor*, 6 Maule & S. 156.

⁴³ *Can v. Read*, 3 Atk. Ch. 695.

nary rules of agency. A payment to the creditor's wife, clerk, or agent, is not good unless they are authorized to receive it;⁴⁴ but this authority may be inferred from the general course of business. Thus, in general, a clerk sitting in a counting-room is authorized to receive payment.

Payment made to an agent after the revocation of his authority is not good.⁴⁵

814. Payment to those who are authorized by law to receive payment, instead of the real creditor, is always valid. The law authorizes the guardian of a minor, the committee of a lunatic, the husband of a woman when there is no trust, the executors of a deceased person, the assignees of an insolvent or of a bankrupt, to receive a payment of what is due to them respectively, and their discharges will be good.

815. The contract sometimes points out a third person to whom payment is to be made; a payment to him will then be good; as, if I sell you my house for five thousand dollars, three thousand dollars payable to me in six months, and two thousand dollars payable in one year to Titius to whom I am indebted, and who has agreed to receive money in payment of my debt. This last sum must be paid to Titius, but this is only on condition that he shall retain his right to act *sui juris*, and he has not transferred his rights to another.

816. When a payment has been made to one who, in reality, had no just right to receive it, it is as if no payment had been made; but if afterward the creditor does certain acts, by which he sanctions it, then it becomes valid, and the debtor is discharged. Such payment may be made effectual in several ways.

By express ratification, which is the approbation of the creditor given after the payment. A ratification has a retrospective effect, and binds the creditor from the time of payment, and is equivalent to an original authority, according to the maxim *omnis ratihabitio mandato æquiparatur*.⁴⁶

The second case is an implied ratification; as, where the money received in payment has been used to liquidate and pay the debts of the creditor for whom it was received, or where the creditor has acted in such a way as to raise a presumption that he acceded to the payment.⁴⁷

A third case is where the debt has been bequeathed to the person who received the money without authority.

817. The principal points to be examined in reference to the thing to be paid, and how the payment is to be made, are: whether one thing may be paid for another; whether the creditor is bound to receive what is due to him in instalments; how the thing which is due is to be paid; and in what state the thing paid ought to be.

818. What is due must be paid in order to make a good payment, and a creditor is not bound to receive anything but what he has contracted for. If, however, he should receive one thing instead of another, the debt would be extinguished, though this would not be a payment, but an accord and satisfaction.

A parol agreement to receive a part payment for the whole, and payment of such part with a receipt in full, will not discharge the debt, for there is no new

⁴⁴ Thrasher v. Tuttle, 22 Me. 335; Johnson v. Cunningham, 1 Ala. 249; Kellogg v. Norris, 10 Ark. 18.

⁴⁵ Erwin v. Blake, 8 Pet. 18; Kellogg v. Gilbert, 10 Johns. N. Y. 220; Langdon v. Potter, 13 Mass. 319; Hudson v. Johnson, 1 Wash. C. C. 10.

⁴⁶ Wood v. Carpenter, 4 Wend. N. Y. 219; Odiorne v. Maxcy, 18 Mass. 178, 182, 15 Mass. 39; Ruggles v. Washington county, 3 Mo. 496; Baker v. Byrne, 2 Smedes & M. Ch. Miss. 193.

⁴⁷ Bredin v. Dubarry, 14 Serg. & R. Penn. 27; Ruggles v. Washington county, 3 Mo. 496; Shaw v. Nudd, 8 Pick. Mass. 9.

consideration.⁴⁸ But a new consideration arises where the payment is made in such a way as to be advantageous to the creditor as before the debt is due,⁴⁹ or in a more convenient place.⁵⁰

But sometimes, by the agreement, there is due one of several things; as when the obligor promises to pay one thousand dollars or one thousand bushels of wheat. The election in these cases to pay which he pleases is in the debtor, so that he has the right to pay either, and the creditor can require nothing else. He cannot, however, deliver a part of each, and the right does not extend beyond the time of payment.⁵¹

An obligation for money payable in collateral articles may be discharged by paying the money.⁵²

Where the debtor gives his negotiable note in payment, this will operate as a discharge if it is received by the creditor as an absolute payment. But unless so received it merely operates to suspend the remedy upon the original debt, and if the note is not paid at maturity the original contract is revived as if no note had been given.⁵³

Giving a negotiable promissory note or bill of exchange is in some states *prima facie* payment unless the contrary be shown to be the understanding.⁵⁴ So a bank check is only conditional payment.⁵⁵

A creditor receiving a note or bill of exchange as a conditional payment is bound to take all the steps as holder or endorser necessary to secure its payment.⁵⁶

Delivery of the note of a third person, voluntarily received by the creditor, is a good payment.⁵⁷

819. As a general rule, the creditor cannot be compelled to receive what is due to him by the debtor in parts; an offer to pay a part does not therefore suspend the interest even for the part tendered. But when there are several independent obligations, he may tender the amount of one of them, and the creditor is required to receive it. And when there are several instalments due, the creditor is bound to receive payment of one of them.

Where a contract is entire the whole must be performed. If it is severable, part performance entitles the party to a proportionate compensation. If the performance of the whole by one party is a condition precedent to the liability of the other, a partial performance gives no claim, and a liability arises only upon the performance of the whole.⁵⁸

820. Payment is made by the delivery of the thing which is due and transferring the property to the creditor. If, therefore, the thing paid is of no value, as if a debtor were to pay in counterfeit coin or bank notes,⁵⁹ or in bank notes

⁴⁸ White v. Jordan, 27 Me. 370; Goodwin v. Follett, 25 Vt. 386; Warren v. Skinner, 20 Conn. 559; Seymour v. Minturn, 17 Johns. N. Y. 169.

⁴⁹ Brooks v. White, 2 Metc. Mass. 283.

⁵⁰ Smith v. Brown, 3 Hawks, No. C. 580.

⁵¹ Coke, Litt. 145, a; 7 Johns. N. Y. 465; 2 Bibb, Ky. 171; Shearer v. Jewett, 14 Pick. Mass. 232; Stevens v. Webb, 7 Carr. & P. 61.

⁵² Sessions v. Ainsworth, 1 Root, Conn. 181; Pothier, Obl. n. 533.

⁵³ Peter v. Beverly, 10 Pet. 567; Sheehy v. Mandeville, 6 Cranch, 253; Wallace v. Agry, 4 Mas. C. C. 336; Van Ostrand v. Reed, 1 Wend. N. Y. 424; Davidson v. Bridgeport, 8 Conn. 472; Elliott v. Sleeper, 2 N. H. 333; Zerrano v. Wilson, 8 Cush. Mass. 424; Smith v. Owens, 21 Cal. 11; Graham v. Sykes, 15 La. Ann. 49; Howard v. Jones, 33 Mo. 583.

⁵⁴ Arnold v. Sprague, 34 Vt. 402; Spooner v. Rowland, 4 All. Mass. 485; Page v. Hubbard, 1 Sprague Dist. Ct. 335; Thornton v. Williams, 14 Ind. 518; Gaskin v. Wells, 15 Ind. 253; Wait v. Brewster, 31 Vt. 516.

⁵⁵ Barnard v. Graves, 16 Pick. Mass. 41; The People v. Howell, 4 Johns. N. Y. 296.

⁵⁶ Brown v. Cronise, 21 Cal. 386; Phoenix Ins. Co. v. Allen, 11 Mich. 501.

⁵⁷ Breed v. Cook, 15 Johns. N. Y. 241; Ellis v. Wild, 6 Mass. 322.

⁵⁸ Booth v. Lyson, 15 Vt. 515; Bowker v. Hoyt, 18 Pick. Mass. 555.

⁵⁹ Ellis v. Whilk, 6 Mass. 321; Bayard v. Shunk, 1 Watts & S. Penn. 92.

of a broken bank,⁶⁰ it is clear there would be no payment, and the debtor must bear the loss.

Where payment is made to a bank in its own notes, and they turn out to be forged, the bank must bear the loss.⁶¹

821. When the thing due is certain and specific, it may be paid or delivered in the condition it is on the day of payment, whatever may be its deterioration, provided it has not been injured by the debtor or those for whom he is responsible, as his servants. If I sell you my horse, deliverable on the first day of April, and in the mean time he meets with an accident without any fault of mine or those for whom I am responsible, as for example loses an eye, a delivery of the horse with that defect will discharge my obligation.

But if I sell you one of my horses, and I have a dozen, without designating which, I shall not discharge my obligation to you by delivering one which has become blind of one eye since our contract; in such case I am to deliver you a sound horse, because at the time of my engagement all my horses were sound.

822. The payment ought to be made when the thing is due, but a payment may be made before it is payable; for example, a note payable six months after date may, with the consent of the creditor, be paid the next day after its date. Where two terms are mentioned for the time of payment, as where goods were sold at six or nine months, the creditor may elect which term he pleases.⁶²

When no time of payment is mentioned in the agreement, it is due the moment the contract is completed.⁶³

The term of promissory notes and bills of exchange is generally extended three days beyond the time mentioned in the contract, which days are called days of grace;⁶⁴ but in some states the days of grace have been abolished.

Where no time of payment or performance is mentioned the contract must be performed in a reasonable time.⁶⁵ Time is not generally considered of the essence of the contract in equity, and the court will interfere in behalf of parties who have failed to perform a contract at the proper time, unless the delay arises from negligence or has injured the other party.⁶⁶

823. The payment must of course be made at the place agreed upon by the contract; but in the absence of such agreement it must be made according to the presumed intention of the parties, which may be ascertained by the nature of the thing to be delivered, and by the custom or usage of the place, which always forms a part of every contract.⁶⁷

If a debtor sends money by mail to his creditor the money is at the risk of the debtor unless the creditor has authorized that mode of remittance.⁶⁸ Such authority may be presumed from a general course of dealing, but not from a single instance of authority.⁶⁹

824. In general the debtor, for a money obligation, is required to find the

⁶⁰ *Westfall v. Braley*, 10 Ohio St. 188; *Eagle Bank v. Smith*, 5 Conn. 71; *Markee v. Hatfield*, 2 Johns. N. Y. 455; *State Bank v. Welles*, 3 Pick. Mass. 394; *Hargrave v. Dusenberry*, 2 Hawks, No. C. 326; *Wainwright v. Webster*, 11 Vt. 576; *Frontier Bank v. Morse*, 22 Me. 88; *Fogg v. Sawyer*, 9 N. H. 365; *Lowry v. Murrell*, 11 Ala. 280; *Townsend v. Bank of Racine*, 7 Wisc. 185.

⁶¹ *U. S. Bank v. Georgia*, 10 Wheat. 333; *Gloucester Bank v. Salem Bank*, 17 Mass. 33.

⁶² *Price v. Nixon*, 5 Taunt. 338. ⁶³ *Bank of Columbia v. Hayner*, 1 Pet. 455.

⁶⁴ *Thomas v. Shoemaker*, 6 Watts & S. Penn. 179; *Cookendorfer v. Preston*, 4 How. 317; *Central Bank v. Allen*, 16 Me. 41. In Louisiana the days of grace are no obstacle to a set-off, the bill being due for this purpose before the expiration of those days. La. Code, art. 2206.

⁶⁵ *Hill v. School District*, 17 Me. 316; *Cocker v. Franklin Mfg. Co.*, 3 Sumn. C. C. 530; *Russell v. Ormsbee*, 10 Vt. 274.

⁶⁶ *Milldam Foundry v. Hovey*, 21 Pick. Mass. 417; *Dickey v. Linscott*, 20 Me. 453.

⁶⁷ *Boynton v. Veazie*, 25 Me. 286.

⁶⁸ *Gurney v. Howe*, 9 Gray, Mass. 404.

⁶⁹ *Dodge v. Smith*, 34 Vt. 178.

creditor and pay him,⁷⁰ for no demand is necessary before suit brought, an action being a sufficient demand.

825. When bulky articles are sold, and there is no place mentioned where the delivery shall be made, they are to be delivered at the place where the things were at the time of the sale. If I sell you my crop of wheat, you are to take it out of my barn, if it was there at the time of sale, and I must give you notice that it is ready for you.⁷¹ And if, after the obligation became due, the debtor separated the articles which were to be paid from others of the same kind, for the purpose of making a payment, they would be the creditor's, and if they were destroyed he would have to bear the loss, according to the rule *res perit domino*.⁷²

826. The effect of a payment is to extinguish the contract and all its accessories, and to liberate those who were debtors.

827. This happens when the thing given in payment is the same thing which forms the object of another obligation; for example, if I have sold you, in payment of a sum of money you had lent me, the thing which I had pledged to you, this payment which I make you by the delivery of the thing extinguishes at the same time the resulting obligation of the loan, and that resulting from the sale of the thing which I sold you.

828. This may take place when there are several creditors; as, if A be indebted to B one hundred dollars, and B being indebted to C, B gave an order to A to pay C this money; the payment by A to C discharges both the obligations due by A to B and B to C. This rule applies also when there are several debtors for the same thing, as where A is principal, and B is security. The payment by A will discharge both B and himself.

829. We have seen that a debtor may be liberated by the payment of a different obligation than his own; when one of two debtors pays the debt, the others are of course liberated, whether they be principal debtors or only sureties. But when the surety pays the debt he is entitled to stand in the place of the creditor, and to be subrogated to all his rights against the principal.⁷³ By *subrogation* is meant the act of putting, by a transfer, a person in the place of another, or a thing in the place of another thing. It is the substitution for an old creditor and the succession to his rights: *transfusio unius creditores in alium*.

830. Regularly a part payment of an entire debt or obligation cannot be insisted upon by the debtor, but if the creditor receives it, his claim is discharged *pro tanto*. But when a debt is due by instalments, the debtor has a right to pay each instalment separately, but not a part of each.

831. By *appropriation* is meant the application of the payment of a sum of money, made by a debtor to his creditor, to one of several debts which are due by the former to the latter. It is frequently of much importance to the parties to which of such debts the payment should be appropriated; some debts are better secured than others, or there may be a surety or a pledge given for one and not for another. It is not always easy to say how the appropriation ought to be made. Some rules have been made for the purpose of ascertaining the rights of the parties; these will now claim our attention.

832. When a debtor owes several debts to the creditor and he pays money on account to him, he has a right to direct the application of the payment to

⁷⁰ Sanders v. Norton, T. B. 4 Monr. Ky. 464; Littell v. Nichols, Hard. Ky. 66.

⁷¹ Evarts v. Butler, Brayt. Vt. 216; Trotter v. McAfee, 2 Ala. 59; Leedom v. Philips, 1 Yeates, Penn. 527; Bates v. Conkling, 10 Wend. N. Y. 389; Zinn v. Rowley, 4 Penn. St. 169.

⁷² Zinn v. Rowley, 4 Penn. St. 169.

⁷³ Ebenhardt's Appeal, 8 Watts, Penn. 327.

which debt he pleases, by doing so at the time of payment; this is called the *right of appropriation*.⁷⁴

833. If the debtor neglect to make the appropriation at that time, then the right *passes to the creditor*; ⁷⁵ and he is not bound to make the application at the time of the receipt of the money. But when once made, as by rendering an account, bringing suit, and declaring in a particular way, the appropriation cannot be changed.⁷⁶

834. When neither party avails himself of the power to make the appropriation, the courts will, as far as possible, make it according to the apparent interest of the parties, and with a view to do equity both to them and their sureties.⁷⁷ To this general rule there are several corollaries:

The application must be made to that debt which is most beneficial to the debtor.⁷⁸

Thus, if one debt is secured by a collateral security, the payment will be applied to that.⁷⁹

When the debts are of an equal nature, the payment must be presumed to be made to discharge the oldest.⁸⁰

When the debts are of the same date, and equal in every other respect, the payment will be appropriated proportionally among them.

When principal and interest are both due, the payment will be first applied to the interest.⁸¹

When one debt is due and another is not, the payment will be applied to the first.⁸²

Courts will apply payments to do justice to sureties and relieve them, whenever they can.⁸³

When there are several debts, and the payment corresponds exactly to one of them, it will be so applied.⁸⁴

When there are several items in an account, and some of them cannot be recovered, while others may be enforced, and a payment is made, it will be applied to the latter.⁸⁵

Where there are running accounts between the parties payments are to be

⁷⁴ *Oliver v. Phelps*, 1 Spenc. N. J. 180; *Bacon v. Brown*, 1 Bibb, Ky. 334; *Starrett v. Barber*, 18 Me. 457; *Selfridge v. Northampton Bank*, 8 Watts & S. Penn. 320; *Gordon v. Hobart*, 2 Stor. C. C. 264; *United States v. Eckford*, 17 Pet. 251, 1 How. 250; *Copland v. Toulmin*, 7 Clark & F. Hou. L. Cas. 350.

⁷⁵ *White v. Trumbull*, 3 Green, N. J. 314; *Salleck v. Turnpike Co.*, 13 Conn. 453; *Pierce v. Knight*, 31 Vt. 701; *Blackman v. Leonard*, 15 La. Ann. 59; *Calvert v. Carter*, 18 Md. 73; *Haymes v. Waite*, 14 Cal. 446.

⁷⁶ *Bank of N. A. v. Meredith*, 2 Wash. C. C. 47.

⁷⁷ *Emery v. Tichout*, 13 Vt. 15; 3 Watts & S. Penn. 550; 5 Watts & S. Penn. 542.

⁷⁸ *Gwinn v. Whitaker*, 1 Harr. & J. Md. 754; *Dorsey v. Garraway*, 2 Harr. & J. Md. 402; *Logan v. Mason*, 6 Watts & S. Penn. 9.

⁷⁹ *New Orleans Ins. Co. v. Tio*, 15 La. Ann. 174; *The Anarctic*, 1 Sprague, Dist. Ct. 206.

⁸⁰ *United States v. Kirkpatrick*, 9 Wheat. 720; *Fairchild v. Holly*, 10 Conn. 175; *Berg-haus v. Alter*, 9 Watts, Penn. 386.

⁸¹ *Jones v. Kilgore*, 2 Rich. Eq. So. C. 63; *Baine v. Williams*, 18 Miss. 113. But the payment cannot be applied by the creditor to usurious interest. *Gill v. Rice*, 13 Wisc. 549; *Smith v. Coopers*, 9 Iowa, 376; *Solomon v. Deschler*, 4 Minn. 278.

⁸² *Peebles v. Dee*, 1 Dev. No. C. 341; *Spires v. Harnot*, 8 Watts & S. Penn. 17; *Jencks v. Alexander*, 11 Paige, Ch. N. Y. 619; *Seymour v. Sexton*, 10 Watts, Penn. 255; *Bacon v. Brown*, 1 Bibb, Ky. 334; *Righter v. Stall*, 3 Sandf. Ch. N. Y. 608; *Heintz v. Cahn*, 29 Ill. 308.

⁸³ *Postmaster General v. Norvell*, Gilp. Dist. Ct. 106; *Harker v. Conrad*, 12 Serg. & R. Penn. 301; *Brander v. Phillips*, 16 Pet. 121; *Myers v. United States*, 1 McLean, C. C. 493; *Pierce v. Knight*, 31 Vt. 701.

⁸⁴ *Huger v. Bocquet*, 1 Bay, So. C. 497.

⁸⁵ *Hilton v. Burley*, 2 N. H. 193; *Rackley v. Pearce*, 1 Ga. 241. See *Ayer v. Hawkins*, 19 Vt. 26; *Treadwell v. Moore*, 34 Me. 112; *Caldwell v. Wentworth*, 14 N. H. 431.

applied to the separate items in the order in which they stand, to the oldest item first.⁸⁶

When a member of a firm is indebted, and the firm owe the same person, a payment made by such partner will be presumed to be on his own account.⁸⁷

When several persons are interested in the notes on which suit is brought, and a partial payment is made on the judgment obtained on them, a surety shall have a proportionate credit.⁸⁸

835. *Payment of money into court* is the actual deposit of money with the clerk or prothonotary of the court in a particular case, made by the defendant to answer the plaintiff's demand. To make such a payment valid there must have been a previous tender, or the payment of the money must be made with leave of court.

Although such payment is not made to the creditor himself, yet it has the effect of a payment when made, and, if it is not in full, it has that effect *pro tanto*.⁸⁹ To give it that effect, however, the money must be paid either, first, after plea of tender pleaded, or, secondly, by leave of court.⁹⁰ When money is paid in under other circumstances, it is paid in at the risk of the defendant.⁹¹

The payment of money into court admits conclusively every fact which the plaintiff would be obliged to prove in order to recover the money, and even when the plaintiff fails in his suit, it will be answerable for costs.⁹² The plaintiff may take it out, but the defendant cannot.⁹³

When the amount paid in is sufficient to pay the plaintiff's claim for principal, interest and costs, up to the time of payment, he can recover no other costs against defendant.⁹⁴

836. By *confusion* is meant the concurrence of two qualities in some subject, which mutually destroy each other.⁹⁵ This confusion may be of goods or of rights. When the qualities of debtor and creditor are united in the same person, there arises a confusion of rights.

837. When a man is indebted to a woman, or *vice versa*, and they marry together, the debt is immediately extinguished, because in both instances the husband is bound to pay and entitled to receive. So if the creditor bequeath the obligation to the debtor. But there is an exception when a bond is given by the intended husband to the intended wife with a view that it should take effect after his death; here there is no confusion.⁹⁶ Indeed, in that case the husband could not be entitled to recover; there could not, therefore, be any confusion of rights.

838. The moment the confusion takes place, the right to receive and duty to pay are extinct, and if the principal obligation is thus extinguished all collaterals are also satisfied.

839. There can be no obligation or debt unless something be due, which is the object of the obligation; hence it follows that if what is promised becomes extinct, no payment can be made. If, for example, for the price of one hundred

⁸⁶ Upham v. Lefavour, 11 Metc. Mass. 184; United States v. Kirkpatrick, 9 Wheat. 720; Gass v. Stinson, 3 Sumn. C. C. 101; Sanford v. Clark, 29 Conn. 457.

⁸⁷ Johnson v. Boone, 2 Harr. Del. 172.

⁸⁸ Blackstone Bank v. Hill, 10 Pick. Mass. 129.

⁸⁹ Murray v. Bethune, 1 Wend. N. Y. 191.

⁹⁰ Mazyeh v. McEwen, 2 Bail. So. C. 28.

⁹¹ Currie v. Thomas, 17 Ala. 293.

⁹² Jenkins v. Cutchens, 2 Miles, Penn. 65; Clement v. Bixler, 3 Watts, Penn. 248.

⁹³ Murray v. Bethune, 1 Wend. N. Y. 191.

⁹⁴ State Bank v. Holcomb, 2 Halst. N. J. 193.

⁹⁵ Pothier, Obl. n. 641; 3 Sharswood, Blackst. Comm. 405; Story, Bailm. § 40.

⁹⁶ Comyn, Dig. Baron et Feme, D.

dollars, which you are to pay me on the first day of January, I agree to deliver you my horse Napoleon, and in the mean time he dies, there is no contract subsisting.

But when the obligation is in the alternative, as, if I had promised you to deliver my horse Napoleon, or my pair of oxen, on the death of the horse I would be obliged to deliver you the oxen.

840. A final judgment in favor of the obligor against the obligee, in a suit founded on the obligation, when rendered by a competent tribunal has the effect to extinguish the obligation, whether such judgment be obtained on the ground of nullity, or fraud, or any other cause whatever; for it is a maxim that *res judicata*, or the decision of a legal or equitable issue by a competent jurisdiction is a complete bar to any future action: *res judicata facit ex albo nigrum, ex nigro album, ex curvo rectum, ex recto curvum*.

An award made by arbitrators chosen by the parties, if made according to the requisitions of the law, is of equal force for this purpose.

A judgment is conclusive between the parties, whether pleaded in bar or introduced as evidence, if the same point was directly in issue between the same parties, no matter what the form of the former action. But the judgment is not conclusive as to matters which were collaterally in question.⁹⁷

The judgment is not conclusive if it turned merely on a technical question of pleading or did not determine the question upon its merits.⁹⁸

A foreign judgment is generally held to be only *prima facie* evidence, and may be impeached for want of jurisdiction and for other causes.⁹⁹

841. In general, contracts are not extinguished by the death of either of the parties; for unless they are strictly personal, that is, to be performed by the contractor in person, they bind the heirs, executors and administrators of the contracting party, for the parties bind all their personal representatives and all the estate they then own or may afterward acquire.

842. But there are debts or obligations which are extinguished by the death of one or other of the parties. Such as are personal in the sense above mentioned; as, where a man binds himself to teach an apprentice, the contract is at an end the moment the master or apprentice dies, so far as to require its further enforcement, but the remedies for a previous breach remain. Other examples will be easily suggested; the contracts of principal and agent and the principal contracts of bailment are of this kind.

843. When parties dealing together have claims against each other, one may deduct the amount which is due to him from the claim which is made against him, and this is called a *set-off*.

Set-off is authorized by statute of 2 Geo. II, c. 24, the principles of which have been re-enacted in this country, or have been adopted by the courts.

844. A set-off can take place only in actions on contracts for the payment of money, as *assumpsit*, debt, or covenant.¹⁰⁰ The set-off does not operate of

⁹⁷ *Duchess of Kingston's Case*, 20 How. St. Tr. 538; *Harvey v. Richards*, 2 Gall. C. C. 229; *Dame v. Wingate*, 12 N. H. 291; *Johnson v. Smith*, 8 Johns. N. Y. 383; *King v. Chase*, 15 N. H. 9; *Harding v. Hale*, 2 Gray, Mass. 399.

⁹⁸ *Hughes v. Blake*, 1 Mas. C. C. 515; *McDonald v. Rainor*, 8 Johns. N. Y. 442; *Dixon v. Sinclair*, 4 Vt. 354.

⁹⁹ *Magoun v. New England Ins. Co.*, 1 Stor. C. C. 157; *Wood v. Walkinson*, 17 Conn. 59; *Rose v. Himely*, 4 Cranch, 269; *Gleason v. Dodd*, 4 Metc. Mass. 333; *McVicker v. Beedey*, 81 Me. 316.

¹⁰⁰ A claim arising from statute cannot be set off. *Augusta v. Chelsea*, 47 Me. 367. A claim sounding in tort may be set off in Iowa. *Campbell v. Fox*, 11 Iowa, 318.

itself; the defendant must plead it,¹⁰¹ but he may waive his right and bring a cross action against the plaintiff.¹⁰²

Where two counter claims have been carried to judgment the court will set off one against the other, though not pleaded in set-off. This is a matter in the discretion of the court, and they will exercise the right whenever it is equitable and does not injure third parties.¹⁰³

845. The demands to be set off must be mutual and due in the same right,¹⁰⁴ and they must be certain, for unliquidated damages cannot be set off.¹⁰⁵ The claim must be good, subsisting at the time and not barred by the act of limitation.¹⁰⁶

846. Though in general the debts do not extinguish each other, yet, perhaps owing to the wording of the statutes, in some states they have that effect, and operate upon the rights of the parties before an action is brought; as in the cases when a man becomes a bankrupt or insolvent, or when he dies, the balance only can be recovered after making the proper set-off.¹⁰⁷

847. No set-off is allowed except between the parties in the suit;¹⁰⁸ joint and separate debts cannot be set off against each other.¹⁰⁹ The claims to be set off against each other must be in the same right, and where the plaintiff sues in his individual capacity the defendant cannot set off a claim due from him in a representative capacity as executor or administrator, receiver, assignee in insolvency.¹¹⁰ Nor can a claim against the intestate's estate which has arisen since his death be set off in an action by the administrator.¹¹¹

848. Time does not usually annihilate a contract, for when one becomes bound he is so until the contract is performed, or he is otherwise discharged, not only himself, but his heirs, executors, and administrators. But a contract may be made by which the contractor may bind himself only for a certain time; as, for example, to become security for a club for one year; to perform service for one year. In all contracts after the end of the time the party is discharged, unless he has before the expiration of the time broken his contract, and in that event he is liable for damages.

849. In nearly all contracts the debtor remains bound, although he has no notice of the breach of the contract by one for whom he is surety. If you

¹⁰¹ *Northampton Bank v. Balliet*, 8 Watts, Penn. 39; *Skinner v. King*, 4 All. Mass. 498; *Nelson v. Wellington*, 5 Bosw. N. Y. 178.

¹⁰² *Hinckley v. Walters*, 9 Watts, Penn. 179; 5 Taunt. 148; 2 Campb. 594.

¹⁰³ *Brown v. Warren*, 43 N. H. 430; *Parker v. Rugg*, 9 Gray, Mass. 209; *Taylor v. Williams*, 14 Wisc. 155; *New Haven Copper Co. v. Brown*, 46 Me. 418; *Temple v. Scott*, 3 Minn. 419; *Duncan v. Bullock*, 18 Tex. 541; *Russell v. Conway*, 11 Cal. 93.

¹⁰⁴ *Waln v. Wilkins*, 4 Yeates, Penn. 461; *Darrock v. Hay*, 2 Yeates, Penn. 208; *Hurlburt v. Ins. Co.*, 2 Sumn. C. C. 471; *Wolfe v. Washburn*, 6 Cow. N. Y. 261.

¹⁰⁵ *McKinley v. Bellows*, 3 Blackf. Ind. 31; *State v. Welsted*, 6 Halst. N. J. 397; *Hepburn v. Hoag*, 6 Conn. 613; *Ricketson v. Richardson*, 19 Cal. 330; *Shropshire v. Conrad*, 2 Metc. Ky. 143; *Hereford v. Babin*, 14 La. Ann. 333. In some states unliquidated damages growing out of contract may be pleaded in set-off. *Keyes v. Western Co.*, 34 Vt. 81; *Morrison v. Lovejoy*, 6 Minn. 319; *Schubart v. Harteau*, 34 Barb. N. Y. 447; *Irish v. Snellson*, 16 Ind. 365; *Bodman v. Harris*, 20 Tex. 31; *Lowen v. Crossman*, 8 Iowa, 325.

¹⁰⁶ *Crist v. Garner*, 2 Penn. 251; *Williams v. Gilchrist*, 3 Bibb, Ky. 49.

¹⁰⁷ See *Krause v. Beitel*, 3 Rawle, Penn. 199; *McDonald v. Webster*, 2 Mass. 498; *Knapp v. Lee*, 3 Pick. Mass. 452.

¹⁰⁸ *Columbia v. Harrison*, 2 Const. So. C. 213; *Johnson v. Bridge*, 6 Cow. N. Y. 693; *Gregg v. James*, 1 Ill. 107.

¹⁰⁹ *Brown v. Warren*, 43 N. H. 430; *Bridgham v. Tileston*, 5 All. Mass. 371; *Cummings v. Morris*, 25 N. Y. 625; *Howard v. Shores*, 20 Cal. 277; *Stadler v. Parmlee*, 10 Iowa, 23; *Milliken v. Gardner*, 37 Penn. St. 456; *Ingersoll v. Robinson*, 35 Ala. n. s. 292; *Harlow v. Rosser*, 28 Ga. 219; *Bove v. Watson*, 13 Ind. 387; *Dart v. Sherwood*, 7 Wisc. 523.

¹¹⁰ *Grew v. Burditt*, 9 Pick. Mass. 265.

¹¹¹ *Fry v. Evans*, 8 Wend. N. Y. 530; *Cook v. Lovell*, 11 Iowa, 81.

become surety that another shall pay me for goods he bought of me, and at the time appointed for the payment he fails to pay, you are still bound to me, although I have given you no notice. But a different rule is observed in relation to indorsers of commercial paper; on failure of payment of a bill of exchange by the acceptor, notice must be given to the drawer and indorsers, and if a promissory note be not paid at maturity, such a notice must be given to the indorsers, or they will be discharged.

850. Sometimes it happens that although a debt has not been paid, it cannot be recovered by action; the law has interposed a perpetual objection to its recovery, by taking away the remedy, which interposition is called a bar: *exceptio peremptoria*.¹¹³ These bars arise from: the act of limitations; lapse of twenty years; discharge of a defendant who has been arrested under a *capias ad satisfaciendum*; bankruptcy.

851. It is a maxim of the common law that a right never dies, and doubtless this is consonant with justice; but in the management of human affairs, it is extremely difficult to retain the evidence of the payment of a debt. Accidents may destroy it, if it be in writing, and death will bury it in the tomb with the witness, when we depend upon oral proof. To remedy these evils the statutes of 32 H. VI, c. 2, and 21 Jac. I, c. 16, were passed in England, by the latter of which it was enacted. That,

"§ 3. All actions of trespass *quare clausum fregit*, all actions of trespass, detinue, action sur trover, and replevin, for taking away of goods and cattle, all actions of account and upon the case, other than such accounts as concern the trade of merchandise, between merchant and merchant, their factors or servants, all actions of debt grounded upon any lending or contract without specialty, all actions of debt for arrearages of rent, and all actions of assault, menace, battery, wounding, and imprisonment, or any of them which shall be sued or brought, shall be commenced and sued within the time and limitation expressed, and not after (that is to say) the said actions upon the case (other than for slander) and the said actions for account, and the said actions for trespass, debt, detinue, and replevin, for goods or cattle, and the said action of trespass, *quare clausum fregit*, within six years next after the cause of such action or suit, and not after, and the said actions of trespass, of assault, battery, wounding, and imprisonment, or any of them, within four years next after the cause of such actions or suit, and not after, and the said actions upon the case for words within two years next after the words spoken, and not after.

"§ 4. If in any one of the said actions or suits judgment be given for the plaintiff, and the same be reversed by error, or a verdict pass for the plaintiff, and upon matter alleged in arrest of judgment, the judgment be given against the plaintiff, that he take nothing by his plaint, writ or bill, or if any of the said actions be brought by original, and the defendant therein be outlawed, and shall after reverse the outlawry, that in all such cases the party, plaintiff, his heirs, executors, or administrators, as the case shall require, may commence a new action or suit from time to time, within a year after such judgment reversed, or such judgment given against the plaintiff or outlawry reversed, and not after.

"§ 5. In all actions of trespass *quare clausum fregit*, hereafter to be brought, wherein the defendant shall disclaim in his plea to make any title or claim to the land in which the trespass is by the declaration supposed to be done, and the trespass is by negligence or involuntary, the defendant shall be permitted to plead a disclaimer, and that the trespass was by negligence or involuntary, and a tender or offer of sufficient amends for such trespass before the action brought,

¹¹³ Coke, Litt. 303, b; Stephen, Pl. Appx. xxviii.

whereupon or upon some of them the plaintiff shall be enforced to join issue, and if the said issue be found for the defendant, or the plaintiff shall be nonsuited, the plaintiff shall be clearly barred from the said action or actions, and all other suits concerning the same.

"§ 6. If any person shall be entitled to any such action of trespass, detinue, action sur trover, replevin, actions of accounts, actions of debt, actions of trespass, for assault, menace, battery, wounding or imprisonment, actions upon the case for words, be or shall be at the time of any such cause of action given or accrued, fallen or come within the age of twenty-one years, *feme covert*, *non compos mentis*, imprisoned, or beyond the seas, that then such persons shall be at liberty to bring the same actions, so as they take the same within such times as are before limited, after their coming to or being of full age, discover, of sane memory, at large and returned from beyond the seas, as other persons having no such impediment would have done."

This statute, with many modifications, has been re-enacted in the several states; its general principles have been retained in those states where the common law has prevailed over the civil law. In Louisiana a system assimilating to the civil law has been adopted. This subject will be considered in the following respects, viz: in what cases the action will be barred; by what law the contract will be barred; when the right of action accrued; when the statute may be avoided.

852. It is a general rule that all contracts founded on *specialties* are not within the statutes, as contracts under seal, liabilities imposed by statute, awards under seal, or where the submission is under seal, indentures reserving rent, and actions for legacies. A mortgage, though under seal, does not take the note, not witnessed, secured thereby, with it, out of the limitation of simple contracts.¹¹³

The statute applies to actions of account, upon the case, and of debt grounded upon any lending as contracts without specialty; and all actions of debt for the recovery of arrearages of rent which shall not have been commenced and sued within six years next after the cause of such action or suit.

853. Although the words of the act do not carry expressly an action of *assumpsit*, yet the courts have construed its provisions to extend to cases within the same reason.¹¹⁴

854. The statute applies also to an action of *debt* founded on a *contract* made between the parties; but when the action of debt is founded upon *construction of law*, the statute cannot be pleaded.¹¹⁵ When the liability of the defendant is created, not merely by the act of the parties, but by the express terms of a statute, the plaintiff is not barred.¹¹⁶

855. The English statute,¹¹⁷ which has been copied in most of the United States almost *verbatim*, contains an exception that "such accounts as concern the trade of merchandise between merchant and merchant, their factors or agents," shall not be barred by its provisions. When a plaintiff brings suit upon such an account, and the statute is pleaded, the plaintiff must reply and show by proof that the action is brought upon an account between merchant and merchant. In such case, the replication and proof must conform to the statute in each of those particulars, namely, that the claim of the plaintiff is founded on

¹¹³ 7 Wend. N. Y. 94.

¹¹⁴ Williams v. Williams, 5 Ohio, 444; Haven v. Foster, 9 Pick. Mass. 112.

¹¹⁵ Pease v. Howard, 14 Johns. N. Y. 479.

¹¹⁶ Bullard v. Bell, 1 Mas. C. C. 243.

¹¹⁷ Statute of Limitations of 21 Jac. I, c. 16.

an account¹¹⁸ which concerns the *trade of merchandise*,¹¹⁹ and that it is *between merchant and merchant*.¹²⁰

The exception of the statute does not apply to stated accounts.¹²¹ Where an account is closed more than six years before suit is brought, it has been held in general that the exception applies,¹²² though the question is involved in much doubt. But the tendency of decisions and of statutes is to bar actions on accounts in six years from the date of the last item. It is not an account within the exception when the items are all on one side.¹²³

856. As the liability of a defendant upon a *judgment* is created by the law, the act of limitations is not pleadable to it.¹²⁴ But this rule applies only to domestic judgments; the rule that the statute is not pleadable to a judgment does not apply to a foreign judgment. Such a judgment is generally considered merely as *prima facie* evidence of the debt, and of no higher nature than a simple contract, and a necessary consequence of this is that the statute of limitations may be pleaded to it.¹²⁵ A distinction, however, has been made between a foreign judgment where the record showed that it was founded upon a specialty or on a simple contract; in the first case the act of limitation is not pleadable, because it could not have been a bar in the original suit.¹²⁶

857. Although the words of the statutes are that it shall apply to "all actions of debt grounded upon any lending, or contract without specialty, all actions of debt *for arrearages of rent*," yet if the rent be created by indenture or under seal, it has been held that the statute is no bar.¹²⁷

858. Courts of equity, though not within the terms of the statute, have nevertheless been uniformly regarded as within its spirit, and have as a general rule been governed by its provisions. The doctrine of the courts is that the statute does not apply *proprio vigore*, but equity makes a presumption of payment by analogy to the statutes not to be overthrown unless special circumstances in the interests of justice require it.¹²⁸

But when the subject matter of the suit is a *trust*, the statute does not operate.¹²⁹ To exempt a trust from the bar of the statute, it must possess the following qualities: It must be a direct trust, it must be of the kind exclusively belonging to a court of equity, the question must arise between the trustee and the *cestui que trust*.¹³⁰ The statute is no bar when there is an express trust,

¹¹⁸ *Spring v. Gray*, 5 Mas. C. C. 525; 6 Pet. 155; *Cottam v. Partridge*, 4 Mann. & G. 271. 4 C. B. N. s. 819; *Mandeville v. Wilson*, Cranch, 15.

¹¹⁹ *Spring v. Gray*, 5 Mas. C. C. 529; 6 Pet. 155.

¹²⁰ *Spring v. Gray*, 5 Mas. C. C. 530; *Hancock v. Cook*, 18 Pick. Mass. 32.

¹²¹ *Toland v. Sprague*, 12 Pet. 300.

¹²² *Mandeville v. Wilson*, 5 Cranch, 15; *Bass v. Bass*, 6 Pick. Mass. 362; *Davis v. Smith*, 4 Me. 339; *Spring v. Gray*, 6 Pet. 151; *Watson v. Lyle*, 4 Leigh, Va. 236; *Coalter v. Coalter*, 1 Rob. Va. 79; *Dyott v. Letcher*, 6 A. K. Marsh. Ky. 541; *contra Coster v. Murray*, 5 Johns. Ch. N. Y. 522; *Van Rhyn v. Vincent*, 1 McCord, Ch. So. C. 310.

¹²³ *Fraylor v. Sonora Co.* 17 Cal. 594; *Prenatt v. Runyon*, 12 Ind. 174.

¹²⁴ *Vincent v. Watson*, 40 Penn. St. 306.

¹²⁵ *Pease v. Howard*, 14 Johns. N. Y. 479.

¹²⁶ *Richards v. Bickley*, 13 Serg. & R. Penn. 395.

¹²⁷ *Freeman v. Stacey*, Hutt. 109; *Kane v. Bloodgood*, 7 Johns. Ch. N. Y. 90.

¹²⁸ *Howland v. Shurtleff*, 2 Mete. Mass. 26; *Hughes v. Edwards*, 9 Wheat. 497.

¹²⁹ *Kutz's Appeal*, 40 Penn. St. 90; *Wyant v. Dieffendafer*, 2 Grant, Cas. Penn. 334; *Robson v. Jones*, 27 Ga. 266; *Andrews v. Smithwick*, 20 Tex. 111.

¹³⁰ *Lyon v. Marclay*, 1 Watts. Penn. 275. See *Wisher v. Ogden*, 4 Wash. C. C. 631; *Rush v. Barr*, 1 Watts. Penn. 120; *Finney v. Cochran*, 1 Watts & S. Penn. 118; *Doebler v. Snavelly*, 5 Watts. Penn. 225; *Spottswood v. Dandridge*, 4 Hen. & M. Va. 139; *Singleton v. Moore*, Rice, Eq. So. C. 110; *Talbot v. Todd*, 5 Dan. Ky. 199; *Houseal v. Gibbes*, 1 Bail. Eq. So. C. 482; *Cooke v. Williams*, 1 Green, Ch. N. J. 209; *Paige v. Hughes*, 2 B. Monr. Ky. 438; *Stephen v. Yandle*, 3 Hayw. No. C. 221; *Gist v. Heirs of Cattel*, 2 Des. Eq. So. C. 53; *Thomas v. White*, 3 Litt. Ky. 177; *Coster v. Murray*, 5 Johns. Ch. N. Y. 224; *Benzoin v. Lenoir*, 1 Car. Law. Rep. 508; *Shelby v. Shelby*, Cooke, Dist. Ct. 182; *Pinson v. Ivey*, 1 Yerg. Tenn. 297.

so long as the fiduciary relation exists; but this rule does not apply when there is only an implied trust, or when he who holds the legal title denies or disclaims it.¹³¹

859. The statute of limitations in general leaves the *government* untrammelled by its provisions, unless expressly restricted, or by necessary implication it is included.¹³²

Counties, towns and municipal bodies not possessed of the attributes of sovereignty are subject to the statute.¹³³

But when a debt due is barred before the instrument, which is the evidence of it, is assigned to the United States, the statute of limitation will be a bar.¹³⁴

860. The act of limitations of the place where suit is brought, or the *lex fori*, as the civilians call it, regulates the rights of the parties. The act does not affect or change the contract, it operates only on the remedy, for the right remains, although the plaintiff may be barred of his remedy by the statute. If the statute of limitations in the state in which the parties lived, and where they made the contract, should limit the time for bringing a suit on a book account to four years, and after the expiration of that time the debtor should remove to another state, where, by its laws, the claim could be recovered by suing at any time before the expiration of six years from the time when the contract was made, he could doubtless recover, although the contract was barred by the laws of the state where it was made; which shows that the debt was not extinguished, although it was barred.¹³⁵

For the same reason, where, by the *lex loci contractus*, the act of limitation was no bar for seventeen years, and the suit was brought in a state where the statute barred the claim in six years, it was held the plaintiff could not recover.¹³⁶

861. The statute begins to run from the time when the creditor could lawfully have commenced an action to recover his claim. The time does not commence to run from the time when the contract was made, for it might happen that six years, the limited time, might expire before the suit could be brought, as

¹³¹ Walker v. Walker, 16 Serg. & R. Penn. 379.

¹³² Lindsey v. Miller, 6 Pet. 666; United States v. Hoar, 2 Mas. C. C. 311; Bagley v. Wallace, 16 Serg. & R. Penn. 245; Birch v. Alexander, 1 Wash. Va. 34; Stoughton v. Baker, 4 Mass. 522; Steward's Lessee v. Mason, 3 Harr. & J. Md. 507; Commonwealth v. McGowan, 4 Bibb, Ky. 62; Weatherhead v. Bledsoe, 2 Tenn. 352; Commonwealth v. Johnson, 6 Penn. St. 136; Johnson v. Irwin, 3 Serg. & R. Penn. 292; Commonwealth v. Hutchinson, 10 Penn. St. 466; Nullum tempus occurit reipublicæ. Cary v. Whitney, 48 Me. 516; Kittaning Academy v. Brown, 41 Penn. St. 269.

¹³³ Lane v. Kennedy, 13 Ohio St. 42; Callaway v. Nolley, 31 Mo. 393.

¹³⁴ The United States v. Buford, 3 Pet. 29.

¹³⁵ See Sturgis v. Crowningshield, 4 Wheat. 122, 200, 207. Mr. Justice Story has given the reasons for this rule with his usual clearness. He says: "In regard to statutes of limitation or prescription, there is no doubt that they are strictly questions affecting the remedy, and not questions upon the merits. They go, *ad litem ordinationem*, and not *ad litem decisionem*, in a just juridical sense. The object of them is to fix certain periods within which all suits shall be brought in the courts of a state, whether they be brought by subjects or by foreigners. And there can be no reason, and no sound policy, in allowing higher or more extensive privileges to foreigners than to subjects. Laws thus limiting suits are founded in the noblest policy; they are statutes of repose, to quiet titles, to suppress frauds, and to supply the deficiency of proofs from the ambiguity and obscurity of transactions. They presume that claims are extinguished because they are not litigated within the prescribed period. They take away all solid grounds of complaint, because they rest on the negligence or laches of the party himself. They quicken diligence, by making it in some measure equivalent to right. They discourage litigation, by burying in one common receptacle all the accumulations of past times which are unexplained, and have now become inexplicable. It has been said by Voet with singular felicity, that controversies are limited, lest they should be immortal while men are mortal: *ne autem lites immortales essent, dum litigantes mortales sint.*" Confl. of Laws, § 576; Bruce v. Luck, 4 Greene, Iowa, 143.

¹³⁶ Nash v. Tupper, 1 Caines, N. Y. 402; Decouche v. Savetier, 3 Johns. Ch. N. Y. 190.

where a note is made payable seven years after date. Before the statute begins to run the creditor must, therefore, have a *full and complete cause of action*. When a period is fixed by the contract, there can be but little doubt as to the time when the action must be brought.¹³⁷

When the time to call for the debt is optional with the creditor, as when a note is payable on demand,¹³⁸ or where the defendant promised to return money borrowed, "when called on to do so,"¹³⁹ the time commences at the date of the transaction or making of the contract. Upon the same principle, the statute begins to run from the time of the monthly balance struck in a bank book of a depositor, because then the action accrued.¹⁴⁰

If a *demand is necessary* to entitle the plaintiff to bring a suit, the statute commences running only from the time of the demand, for until a demand is made no action accrues. This is the case when a factor has not accounted over; to entitle the principal to an action, he must have made a demand, and from that time only does the act begin to run.¹⁴¹

The statute does not begin to run, where there is an entire contract, until it is *wholly completed*, because till then the plaintiff has no cause of action; as where a man engages to serve another for one year for the consideration of two hundred dollars, as he can maintain no action till he has fully performed the services, the act will not begin to run till that time.¹⁴² So the statute begins to run, on a claim for work and labor, from the time when the work was finished, and not from the period when the contract was made;¹⁴³ nor against the claim of an attorney for professional services before a demand is made or the professional relation has been dissolved.¹⁴⁴

In general, the right of action accrues upon a breach of the contract, and it is immaterial whether the party injured knows of the breach or not.¹⁴⁵ But where the right of action was *fraudulently concealed* by the defendant from the plaintiff, the statute begins to run only from the discovery of the fraud.¹⁴⁶ In some states this effect is held only in equity and not in law,¹⁴⁷ but the better opinion seems to be the one first stated. The plaintiff must, however, be charged with notice of the fraud as soon as he could have discovered it by reasonable diligence.¹⁴⁸

862. There are several ways by which the statute may be avoided: By proof that the plaintiff was under some one of the disabilities mentioned in the statute, or that the debtor has acknowledged the debt and by a new promise

¹³⁷ Banks v. Coyle, 2 A. K. Marsh. Ky. 564; Jones v. Conway, 4 Yeates, Penn. 109; Odlin v. Greenleaf, 3 N. H. 270; Richman v. Richman, 5 Halst. N. J. 114.

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where a note is made payable seven years after date. Before the statute begins to run the creditor must, therefore, have a *full and complete cause of action*. When a period is fixed by the contract, there can be but little doubt as to the time when the action must be brought.¹³⁷

When the time to call for the debt is optional with the creditor, as when a note is payable on demand,¹³⁸ or where the defendant promised to return money borrowed, "when called on to do so,"¹³⁹ the time commences at the date of the transaction or making of the contract. Upon the same principle, the statute begins to run from the time of the monthly balance struck in a bank book of a depositor, because then the action accrued.¹⁴⁰

If a *demand is necessary* to entitle the plaintiff to bring a suit, the statute commences running only from the time of the demand, for until a demand is made no action accrues. This is the case when a factor has not accounted over; to entitle the principal to an action, he must have made a demand, and from that time only does the act begin to run.¹⁴¹

The statute does not begin to run, where there is an entire contract, until it is *wholly completed*, because till then the plaintiff has no cause of action; as where a man engages to serve another for one year for the consideration of two hundred dollars, as he can maintain no action till he has fully performed the services, the act will not begin to run till that time.¹⁴² So the statute begins to run, on a claim for work and labor, from the time when the work was finished, and not from the period when the contract was made;¹⁴³ nor against the claim of an attorney for professional services before a demand is made or the professional relation has been dissolved.¹⁴⁴

In general, the right of action accrues upon a breach of the contract, and it is immaterial whether the party injured knows of the breach or not.¹⁴⁵ But where the right of action was *fraudulently concealed* by the defendant from the plaintiff, the statute begins to run only from the discovery of the fraud.¹⁴⁶ In some states this effect is held only in equity and not in law,¹⁴⁷ but the better opinion seems to be the one first stated. The plaintiff must, however, be charged with notice of the fraud as soon as he could have discovered it by reasonable diligence.¹⁴⁸

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statute.¹⁵⁷ The joint creditor can always use the names of the others in the action, but the courts will not compel an action to be brought against one of several debtors who may be the least responsible.

The moment that the party *returns* to the state, in the case of a defendant, when he openly shows himself so that a writ might be served upon him, the statute begins to run, and, having taken its course, it never stops on account of any subsequent disability.¹⁵⁸ What shall be considered a return will depend upon circumstances. In the case of a defendant his return must be open, and such as would enable the plaintiff, by using due diligence, to serve process upon him. A temporary and transient return in a remote part of the state, so that the plaintiff had not seasonable notice, or if the defendant concealed himself, except on Sundays, so that no writ could be served upon him, it is not such a return as will bring the case within the operation of the statute.¹⁵⁹

The operation of the statute is suspended during the time intervening between the death of the debtor and the appointment of an administrator.¹⁶⁰ A similar exemption is made in most of the states for a reasonable time after the death of a creditor.¹⁶¹

866. When the statute has been pleaded by the defendant, if the plaintiff can avoid the bar by showing that the defendant has acknowledged the debt within the time prescribed by the statute, he should reply a new promise within the period limited. By a new promise is understood a contract made between the original parties or their representatives after the original promise has, for some cause, been rendered invalid, by which the promissor agrees to fulfil his original promise.¹⁶²

When the plaintiff has replied a new promise, he must prove that such an express promise has been made. To prevent perjuries, in several of the states of the Union it is required that such a promise should be in writing; but, in the absence of any statutory provision, such new promise may be proved by parol evidence. But it is indispensable that there should be an express promise; it may be raised, by implication of law, from the acknowledgment of the party. To be valid, such acknowledgment must contain an unqualified and direct admission of a present subsisting debt, which the debtor is liable and willing to pay.¹⁶³ When the acknowledgment is conditional, the plaintiff must prove that the condition has been performed or performance tendered.¹⁶⁴

¹⁵⁷ *Cutler v. Wright*, 22 N. Y. 472.

¹⁵⁸ *Palmer v. Shaw*, 16 Cal. 93. In New York the successive absences are to be added together to make up the period. *Cutler v. Wright*, 22 N. Y. 472; *Cole v. Jessup*, 10 N. Y. 96; but temporary absences are not to be counted. *Hickok v. Bliss*, 34 Barb. N. Y. 321.

¹⁵⁹ *Fowler v. Hunt*, 10 Johns. N. Y. 464; *Byrne v. Crowningshield*, 1 Pick. Mass. 263; *Crosby v. Wyatt*, 23 Me. 156; *Ruggles v. Keeler*, 3 Johns. N. Y. 264; *Angell, Lim.* 223.

¹⁶⁰ *Briggs v. Thomas*, 32 Vt. 176.

¹⁶¹ *McNeill v. McNeill*, 35 Ala. n. s. 30.

¹⁶² This exception is made by the courts and not by the statute. The valid contract is the new contract made by the new promise, but the consideration is the pre-existent debt, and as the statute merely bars the remedy, the consideration is more than a mere moral obligation.

¹⁶³ *Angell, Lim.* 234-247; *Guier v. Pearce*, 2 Browne, Penn. 35; *Miles v. Moodie*, 3 Serg. & R. Penn. 211; *Eckert v. Wilson*, 12 Serg. & R. Penn. 397; *Fries v. Boisselire*, 9 Serg. & R. Penn. 128; *Yoxheimer v. Keyser*, 11 Penn. St. 364; *Bell v. Morrison*, 1 Pet. 362, 365; *Porter v. Hill*, 4 Me. 41; *Stanton v. Stanton*, 2 N. H. 496; *Bell v. Rowland*, Hard. Ky. 301.

¹⁶⁴ *Laforge v. Jayne*, 9 Penn. St. 410; *Wetzell v. Bussard*, 11 Wheat. 309. As this exception is in derogation of the statute, all new promises should be strictly interpreted. A mere admission of the debt is not enough; it must be coupled with a promise, for the debtor may admit the debt and refuse to pay or declare his intention to set up the statute. *Webster v. Newbold*, 41 Penn. St. 482; *Stewart v. Watts*, 15 La. Ann. 135; *Moore v. Stevens*, 33 Vt. 308; *Cook v. Martin*, 29 Conn. 457; *Higdon v. Stewart*, 17 Md. 105.

An implied acknowledgment arises from the existence of *mutual accounts* between the parties, when there are items on both sides within the period of limitation, and the case is taken out of the statute.¹⁶⁵ The courts presume that when a party makes a charge against another on a mutual account that he thereby admits, as regards himself, that the account is unsettled; when a defendant has made such a charge, it has been holden sufficient to save the plaintiff's account;¹⁶⁶ but if the items in the defendant's accounts are all of an earlier date, though some of the plaintiff's charges may be within the time limited by the statute, all the claims will be barred except those items charged within the time.¹⁶⁷

These promises and acknowledgments can be replied to the plea of the statute only in cases where the original obligation arose on a contract; for, when the cause of action arises *ex delicto*, or is given by positive statute, irrespective of any promise or neglect of duty of the party, as in the case of actions against executors or administrators upon the contract of him whom they represent, the new promise or acknowledgment, however unequivocal and positive, will not revive the cause of action if once barred by lapse of time.¹⁶⁸

The new promise must be made by the debtor. Where there are joint debtors, a new promise by one has been held to bind all as long as the privity exists, so that one has authority to act for all.¹⁶⁹ But some such authority and privity must exist, and is not presumed in all joint debts. In case of a partnership debt, one partner having undoubtedly authority to act for all may revive the debt by a new promise, but he may not do this after the dissolution of the partnership.¹⁷⁰ The later decisions tend to establish the general rule that a new promise by one joint debtor will not affect the others.¹⁷¹

Part payment of a debt is *prima facie* evidence of a new promise to pay the remainder,¹⁷² but it may be rebutted by other evidence. Payment of interest has the same effect as payment of principal. The payment must be on account of the debt.

867. Another mode of avoiding the bar of the statute is by proof of *fraud* in the defendant, committed under such circumstances as to conceal from the plaintiff all knowledge of the fraud, and thus to prevent him from asserting his rights until a period has elapsed beyond the time limited by the statute. In order to entitle himself to show this, the plaintiff must make replication of the fact, for he cannot give it in evidence under the issue formed on a plea of the statute.¹⁷³

An offer to compromise is not a new promise. *Slack v. Norwich*, 32 Vt. 818; *Morehead v. Gallinger*, 9 Iowa, 519.

A conditional promise to pay is enough. *Mullet v. Shrumph*, 27 Ill. 107; but the plaintiff must bring himself within the condition.

¹⁶⁵ *Tucker v. Ives*, 6 Cow. N. Y. 193; *Cogswell v. Oliver*, 2 Mass. 247.

¹⁶⁶ *Davis v. Smith*, 4 Me. 337; *Sickles v. Mather*, 20 Wend. N. Y. 72.

¹⁶⁷ *Gold v. Whitcomb*, 14 Pick. Mass. 188.

¹⁶⁸ *Parkman v. Osgood*, 3 Me. 17; *Dawes v. Shed*, 15 Mass. 6; *Thompson v. Brown*, 16 Mass. 172; *Hurst v. Parker*, 1 Barnew. & Ald. 92; *Oothout v. Thompson*, 20 Johns. N. Y. 277.

¹⁶⁹ *Frye v. Barker*, 4 Pick. Mass. 382; *Patterson v. Choate*, 7 Wend. N. Y. 441; *Walton v. Robinson*, 5 Ired. No. C. 341.

¹⁷⁰ *Payne v. Slate*, 39 Barb. N. Y. 634; *Sage v. Ensign*, 2 All. Mass. 245.

¹⁷¹ *Shoemaker v. Benedict*, 11 N. Y. 176; *Kelley v. Sandborn*, 9 N. H. 46; *Belote v. Wynne*, 7 Yerg. Tenn. 534. *Contra*, *Sigourney v. Drury*, 14 Pick. Mass. 387; *Shepley v. Waterhouse*, 22 Me. 497.

¹⁷² *Barran v. Kennedy*, 17 Cal. 574; *Foster v. Starkey*, 12 Cush. Mass. 324; *Burr v. Williams*, 20 Ark. 171.

¹⁷³ See *Sherwood v. Sutton*, 5 Mas. C. C. 143; *Bree v. Holbeck*, 2 Dougl. 654. See before **861** as to fraudulent concealment.

868. *The lapse of twenty years* without explanatory circumstances, raises the presumption of certain facts, and, after that time, the party against whom the presumption has been raised will be required to prove a negative, and show that the fact is otherwise.

After twenty years from the time it became due, a bond, mortgage or other specialty, will be presumed to have been paid.¹⁷⁴ And the same presumption arises that a judgment has been paid, if no steps have been taken by the plaintiff after its rendition.¹⁷⁵

When a debt is payable by instalments and secured by a penal bond, the presumption of payment arising from lapse of time applies to each instalment as it falls due.¹⁷⁶

But in all these cases the presumption may be easily rebutted, by showing the payment of interest during that time, an admission that the debt was not paid, or other circumstances which rebut the presumption.¹⁷⁷

869. When the defendant has been arrested under a *capias ad satisfaciendum*, and he is voluntarily discharged by the plaintiff, he cannot be retaken, nor can his property be afterward seized.¹⁷⁸ Indeed, the rule has been extended so far that if one of several joint debtors has been arrested on a *capias ad satisfaciendum*, and he has been subsequently discharged by the creditor, this extinguishes the judgment as to all the debtors, so that neither of them can afterward be taken in execution.¹⁷⁹ But the taking in execution the body of one of two joint trespassers is not such a satisfaction of the judgment as to bar an action against his co-trespasser.

870. In general, *bankruptcy* discharges not only the person of the debtor, but all property he may acquire afterward.

In this country the United States alone have the power to pass bankrupt laws. A discharge in bankruptcy frees the person of the bankrupt and his after acquired property from all liability for his former contracts; and absolutely annuls the contract by substituting new rights. It is of course a perfect bar to an action. An insolvent law in this country merely affects the remedy, and is a complete bar to an action, leaving the contract as it was.

But in all the cases mentioned, when the remedy is taken away by a legal bar, if the debt has not been paid, there remains such a moral obligation that a promise to pay it, made after the remedy is gone, will revive it, so that an action will lie on a new promise for which the old debt is a sufficient consideration.¹⁸⁰

¹⁷⁴ 1 Greenleaf, Ev. § 39.

¹⁷⁵ *Kennedy v. Executors of Donoon*, 3 Brev. So. C. 476; *Boardman v. De Forest*, 5 Conn. 1.

¹⁷⁶ *The State v. Lobbis Admr.* 3 Harr. Del. 421.

¹⁷⁷ 2 Harr. Del. 124; 9 N. H. 398; Best, Presumptions, part 1, ch. 2 and 3. See Cowen's Note to 1 Phillips, Ev. 160, note 307, vol. 3, p. 316. The limitation of twenty years for actions upon bonds, judgments, etc., is a part of the statute of limitations of all the states, and the same rule applies to personal actions not within the shorter limit. It is therefore a complete bar. The same limitation applies to real actions and an adverse holding for twenty years, no disability, as infancy, etc., intervening, gives a good title.

¹⁷⁸ *Cooper v. Bigelow*, 1 Cow. N. Y. 56. Owing to statutory provisions the rule is not the same in South Carolina, *Eggart v. Barnstine*, 3 McCord, So. C. 162; nor in Ohio, *King v. Kerr*, 5 Ohio, 154.

¹⁷⁹ *Ransom v. Keyes*, 9 Cow. N. Y. 128; *Bailey v. Kimbal*, 1 N. Chipm. Vt. 151. See *King v. Kerr*, 5 Ohio, 154; *Scott v. Colmesnil*, 7 J. J. Marsh, Ky. 416; *Sheldon v. Kibbe*, 3 Conn. 214.

¹⁸⁰ *Maxim v. Morse*, 8 Mass. 127; *Field's case*, 2 Rawle, Penn. 351; *Kingston v. Whar-ton*, 2 Serg. & R. Penn. 208.

CHAPTER VI.

FORM OF CONTRACTS.

- 872. Contracts of record.
- 873-904. Contracts in writing.
- 874-893. Contracts under seal.
- 875. Form of a deed.
- 877. The seal.
- 878. Delivery of a deed.
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- 881. Bonds.
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- 883-890. Mortgage.
- 884. Legal mortgage of lands.
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- 889. For what debts mortgages may be given.
- 890. Difference between mortgage and conditional sale.
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- 895. Bills of exchange.
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- 897-899. Bills of lading.
- 898. Form of bill of lading.
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- 901. Charter party.
- 902. Articles of agreement.
- 904. Letters or correspondence.
- 905-909. Contracts not in writing.
- 910-920. The statute of frauds.
- 911. Promises by executors or administrators.
- 912-914. Guaranties.
- 913. Nature of debt in guaranty.
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- 916. Contracts for sale of land.
- 917. Promises not to be performed within one year.
- 918-920. The memorandum.
- 919. Form of the memorandum.
- 920. The signature.

871. It is not sufficient to make agreements; they must be made in such a way that they can be proved and established in a court of justice whenever required; and in some cases, to be valid, they must be reduced to writing in order to comply with certain statutory provisions.

Contracts are divided, as to their form, into those which are of record, those in writing, and those not in writing. These will be considered in order.

872. The principal contract of record is a *recognizance*, which is an obligation of record, entered into before a court or officer duly authorized for that purpose, with a condition to do some act required by law to be done, or to refrain from doing some act forbidden by law which is therein specified.¹

As to their *form*, recognizances are mere acknowledgments before the court, judge, or magistrate having authority to take the same. It is a short entry on the record of the substance of the engagement without the same being signed by the recognizer.

A recognizance is taken for a certain sum, with a condition that the cognizor will pay a debt or do some other thing.

A recognizance in civil cases is entered into by bail, conditioned that they will pay the debt, interest and costs recovered by the other party under certain contingencies, and for other purposes under statutes. A very common case is where a party appeals to a higher court from a judgment, and is to secure payment if the judgment is confirmed.

In criminal cases it is either that the party shall appear before the proper court to abide its judgment, or shall keep the peace or be of good behavior.

873. Much difference exists between a contract under seal and one not under seal, though both be in writing.

874. A contract under seal is called a *specialty* or *deed*. A deed is an instrument under seal, written or printed, containing some contract or agreement, and which has been delivered by the parties.² This is the generic name for all writings under seal, whether they relate to the conveyance of lands or other matters. But the word deed is in a more confined sense used to designate a conveyance of real estate. A specialty is a written agreement under seal.³

We will consider the form of deeds, the matter and effect of a deed, the kinds of deeds.

875. The deed must contain a contract, must be under seal, and must be delivered. It must be made between competent parties, without fraud or restraint, and must be completely written before delivery. At common law it need not be signed, but a conveyance of land must now be signed in all the states except Florida, Mississippi, North Carolina, Tennessee and Texas.

876. It is evident from our definition of a deed that some contract must be the object of the instrument, for if it were not for this, there would be no deed in the true meaning of the word. An epistolary letter is a writing, sealed and delivered, but it is not a deed. And a blank piece of paper, signed (which was a writing), sealed and delivered, and afterward written upon, was held to be no deed.⁴

877. To make a valid deed a writing must be sealed, for if it has no seal it is no deed; the question then arises as to what is a seal. A seal is defined to be an impression upon wax, wafer, or some other tenacious substance capable of being impressed.⁵ Lord Coke defines a seal to be wax, with an impression.⁶ "*Sigillum*," says he, "*est cera impressa, quia cera sine impressione non est sigillum*." It is presumed, however, that if wax were dropped on the paper or parchment while hot and it adhered to it, such wax would be considered as a seal if the party had adopted it as such, whether any impression had been made on it or not.

¹ 2 Sharswood, Blackst. Comm. 341; Brooks, Abr. *Recognizance*; 1 Chitty, Crim. Law, 90.

² Coke, Litt. 171; 2 Sharswood, Blackst. Comm. 295; Sheppard, Touchst. 50.

³ Taylor v. Glazier, 2 Serg. & R. Penn. 502; Mitchell v. Parham, Harp. So. C. 1.

⁴ Duncan v. Hodges, 4 McCord, So. C. 239; Permynter v. McDaniel, 1 Hill So. C. 267.

⁵ Warren v. Lynch, 5 Johns. N. Y. 239.

⁶ Coke, 3 Inst. 169.

Merlin⁷ defines a seal to be a plate of metal with a flat surface, on which are engraved the arms of a prince or private individual, or other device, with which an impression is made on wax or other soft substance, or on parchment or paper, in order to authenticate them; the impression thus made is also called a seal.

All these definitions are imperfect in this country, because in some of the states the impression upon wax is not always used, and a circular, oval, or square mark, opposite the name of the signer, has the same effect as a seal. It is usually made with a pen, and the shape of it is altogether indifferent.⁸

When there are several obligors and but one seal, it is presumed each one adopted the same seal.⁹

878. A *delivery* is necessary to a deed, but it is not requisite that the delivery should be express, it may be implied from the acts of the grantor; as, where the deed was put into the recorder's office to be recorded at the request of the grantor, for the use of the grantee, and the grantor subsequently assented to it, this was considered as a delivery.¹⁰ And putting a deed into the post-office by the grantor, directed to the grantee, is a sufficient delivery.¹¹ A presumption of delivery arises from the fact that the deed is in possession of the grantee.¹²

A deed may be delivered to a third person for the use of the grantee; it takes effect immediately, and is then *absolute*; or it may be delivered to such person *conditionally* or as an *escrow*. It has then no binding effect until the condition has been performed,¹³ and, by relation, it refers back to the delivery.

879. A deed or specialty differs from any other agreement in writing in various particulars, the principal of which are the following:

It always imports a consideration, and although one is generally stated, it is not indispensably requisite.¹⁴

The right to it cannot be transferred at common law, like a promissory note, by a bare indorsement; such indorsement may convey the equitable right, but not the legal title.

It is not barred by the act of limitations, and no presumption of payment arises till a period of twenty years has elapsed, nor then, if the reason for the non-payment can be explained.

A man who makes a specialty is estopped from denying or disproving any

⁷ Merlin, Répert. Sceau.

⁸ 2 Serg. & R. Penn. 503; United States v. Coffin, Bee, Dist. Ct. 140; Duncan v. Duncan, 1 Watts, Penn. 322; Cromwell v. Tate, 7 Leigh, Va. 801; Commerford v. Cobb, 2 Fla. 418.

A scroll with the pen is a sufficient seal in Arkansas, Delaware, Florida, Michigan, Wisconsin, Minnesota, Oregon, Missouri, Ohio, Texas, Illinois, Mississippi, Georgia, Indiana, Maryland, North Carolina, Pennsylvania and South Carolina. Ark. Dig. St. 1858, Ch. 155, § 2; Thompson, Dig. Fla. Laws, 348; 2 Mich. Comp. Laws 844, Ch. 38, § 39; Wisc. Rev. St. Ch. 86, § 239; Oregon, Stat. 1858, p. 523, § 37; 1 Mo. Rev. St. 1855, p. 352; Ohio, Rev. St. Ch. 102, § 1; Oldham & W. Dig. Tex. Laws, 1859; Ill. Comp. St. 1858, p. 240; Miss. Rev. Code, 355; Cobb, New Dig. Ga. Stat. 1851, p. 274. The rule of the common law still holds in New Jersey and the New England states. It seems that in all the states an impression stamped on the paper is a good seal, and this is the common method now of affixing corporation seals. Pillow v. Roberts, 13 How. 473.

⁹ Mackay v. Bloodgood, 9 Johns. N. Y. 285; Tasker v. Bartlett, 5 Cush. Mass. 359; Lambden v. Sharp, 9 Humphr. Tenn. 224.

¹⁰ Hedge v. Drew, 12 Pick. Mass. 141.

¹¹ McKenney v. Rhodes, 5 Watts, Penn. 343. See White v. Bailey, 14 Conn. 271.

¹² Green v. Yarnall, 6 Mo. 326; Dunn v. Games, 1 McLean, C. C. 821; Hatch v. Haskins, 17 Me. 391.

¹³ Currie v. Donald, 2 Wash. Va. 68; 14 Conn. 271; Wheelright v. Wheelright, 2 Mass 447.

¹⁴ Horn v. Gartman, 1 Fla. 63.

fact recited in it;¹⁵ in a simple contract, on the contrary, although an admission in it of a fact affords evidence of its truth, it may be disproved by other proof.¹⁶

880. We have already observed that the word *deed* has two meanings: one, which is the generic name for all instruments under seal, and another, which, in a more confined sense, signifies a conveyance of real estate. Of this last we shall have occasion to speak in another place. Here our observations will be confined to the first. Deeds of this description are bonds, single bills, mortgages, and covenants.

881. A *bond* is an obligation in writing and under seal, by which the maker, called the obligor, binds himself, his heirs, executors and administrators, to pay to the other party, called the obligee, a certain sum of money. A conditional bond (which is the kind generally used) has also a condition that if the obligor does some particular act the obligation shall be void. The sum of money first specified is called the penal sum or penalty of the bond, and is usually double the sum mentioned in the condition where the condition is to pay money. A bond conditioned to do an unlawful act is void. If the condition becomes impossible, the bond is an absolute obligation. When a bond becomes absolute the whole penalty was formerly recoverable at law, but the courts of equity interfered, and the equitable doctrine now prevails, and the obligee in this can only recover the damages which he has sustained by the breach of the condition with interest and costs, the whole amount not to exceed the penalty of the bond. The following are the requisites of a valid bond:

There must be proper parties, one or more obligors, and one or more obligees.

The words must clearly declare the intention of the parties, but no particular form of words is required.

It must be in writing, on paper or parchment, and if made on other materials, it is void.¹⁷

It must be under seal.

It must be delivered.

It ought to be dated, but as the date is no substantial part of a deed, a bond that either has no date, or an impossible one, is not void on that account. It takes effect from the day of delivery.¹⁸

882. A *single bill* is in the form of a bond without any condition; it must be in writing, under seal, and delivered, and the object must be to promise a payment of money.

883. *Mortgages* are of several kinds; as they concern the nature of property mortgaged, they are mortgages of lands, tenements, and hereditaments, or of goods and chattels; as they affect the title of the thing mortgaged, they are legal and equitable.

884. A *legal mortgage* may be described to be a conveyance by deed of lands by a debtor, called the mortgagor, to his creditor, called the mortgagee, as a pledge and security for the payment of money borrowed, or the performance of a covenant, with a proviso that the conveyance shall be void on the payment of the money and interest on a certain day, or the performance of the covenant by the time appointed; by which the conveyance of the land becomes absolute at law; yet the mortgagor has an equity of redemption, that is, a right in equity to

¹⁵ 2 Sharswood, Blackst. Comm. 295; Comyn, Dig. *Estoppel*, A; 1 Greenleaf, Ev. § 24, 25, 211.

¹⁶ Parish v. Stone, 14 Pick. Mass. 201, 202.

¹⁷ Bacon, Abr. *Obligations*, A; Coke, Litt. 229; 2 Sharswood, Blackst. Comm. 297.

¹⁸ 2 Sharswood, Blackst. Comm. 304.

perform the agreement in a reasonable time, and to call for a reconveyance of the land.¹⁹

A mortgage differs from a pledge; the general property passes by a mortgage, while by a pledge only the possession or at most a special property passes. All kinds of property, real or personal, which are capable of an absolute sale may be the subject of a mortgage; rights in remainder and reversion, franchises and choses in action, may therefore be mortgaged.

885. As to the form, a mortgage must be in writing and under seal, between parties capable of contracting. It is usual to insert the condition of the mortgage in the deed, but sometimes the conveyance of the land is absolute, and the grantee, by a separate instrument, called a *deed of defeasance*, agrees to reconvey the land to the grantor, on his paying a certain sum of money. At law the defeasance must be of as high a nature as the conveyance to be defeated.²⁰ The two instruments make but one contract, and both must be recorded in order to give them validity as a mortgage against lands.²¹

In equity it is held in some of the states that any agreement in writing is sufficient to constitute a defeasance, though the mortgage be sealed.²²

In general, whatever clauses or covenants are introduced in a conveyance, though they seem to import an absolute disposition or an additional purchase, yet if upon the whole it appears to have been the intention of the parties that such conveyance should have been a mortgage only, or pass an estate redeemable, a court of equity will always so construe it.²³ And it is a universal rule that an instrument once a mortgage is always a mortgage.²⁴

886. At common law mortgages were held conveyances upon condition, and the estate became absolute unless the condition was performed. But in equity the mortgage is only a pledge of the land as security for a debt; the debt is the principal obligation, the mortgage only collateral. The equitable doctrine has been adopted to an unequal extent by the courts of law of the different states. There must be some evidence of a debt from the grantor to the grantee in order to construe the instrument as a mortgage.

This is usually a bond or note given with the mortgage. But this debt need not be a personal obligation, enforceable against the grantor. It is enough if it bind the property,²⁵ and the mortgage being collateral is discharged if the debt is paid. Where the only evidence of the debt is a proviso that if the grantor pays, etc., the deed shall be void, the grantee has no claim against the mortgagor personally, but can only enforce his remedy against the land.²⁶

887. An *equitable mortgage of lands* is a lien recognized in equity as a security for the payment of debts. It may be created by a deposit of the title-deeds. This is regarded as an agreement to make a mortgage, and is recog-

¹⁹ Cruise, Real Prop. t. 15, c. 1, s. 11.

²⁰ Lund v. Lund, 1 N. H. 39; Flagg v. Mann, 14 Pick. Mass. 467; Eaton v. Green, 22 Pick. Mass. 526; Kelly v. Thompson, 7 Watts, Penn. 401; Dey v. Dunham, 2 Johns. Ch. N. Y. 191; Richardson v. Woodbury, 43 Me. 206.

²¹ Brown v. Dean, 3 Wend. N. Y. 208; Jaques v. Weeks, 7 Watts, Penn. 261.

²² Reed v. Gaillard, 2 Dess. Ch. So. C. 552; Hicks v. Hicks, 5 Gill & J. Md. 75; Batty v. Snook, 5 Mich. 231; Cross v. Hepner, 7 Ind. 359; Breckinridge v. Auld, 1 Rob. Va. 148; Belton v. Avery, 2 Root, Conn. 279; Marshall v. Stewart, 17 Ohio, 356.

²³ Vern. Ch. 183; Rice v. Rice, 4 Pick. Mass. 349; Catlin v. Chittenden, Brayt. Vt. 163; Page v. Foster, 7 N. H. 392.

²⁴ 2 Cow. N. Y. 324; Wheeland v. Swartz, 1 Yeates, Penn. 584.

²⁵ Russell v. Southard, 12 How. 139; Smith v. People's Bank, 24 Me. 185; Hickox v. Lowe, 10 Cal. 197; Murphy v. Calley, 1 All. Mass. 108; Flagg v. Mann, 2 Sumn. C. C. 534.

²⁶ Salisbury v. Philips, 10 Johns. N. Y. 57; Drummond v. Richards, 2 Munf. Va. 337; Conway v. Alexander, 7 Cranch, 218; Scott v. Fields, 7 Watts, Penn. 360; Hill v. Eliot, 12 Mass. 26.

nized by the courts.²⁷ But under our system of registration such a mortgage is invalid against a purchaser without notice, and is of little consequence in this country.

An equitable mortgage arises also in favor of the vendor who has a lien on the land for the purchase money. The purchaser is regarded as the trustee of the vendor of the premises until the money is paid. This lien is recognized in most of the states;²⁸ but this, like the other, is not good against *bona fide* purchasers or mortgagees without notice,²⁹ nor against creditors.³⁰ The vendor loses his lien if he does any act showing his intention not to rely on the land for security, as where he accepts a separate security.³¹

888. A grant or conveyance of *chattels* in gage or mortgage passes the whole legal title conditionally to the mortgagee, and if not redeemed at the time stipulated, the title becomes absolute at law, though equity will interfere to compel a redemption.³²

Some mortgages of chattels have been held valid without possession, but they stand upon very peculiar grounds, and may be deemed an exception to the general rule, which requires that possession of chattels should accompany the mortgage.³³

In most of the states chattel mortgages are required by statute to be recorded like mortgages of real estate. In such cases record without possession is enough, and the lien is good against subsequent purchasers.³⁴

There are various liens existing at common law, in admiralty and by statute, as the liens of material men and mechanics. These, in general, partake of the nature of equitable mortgages, and are subject to various statutory requirements, varying in the different states.

889. In general a mortgage is given merely as a collateral security for the payment of a bond or other written obligation of the mortgagor, but this is not indispensable, if there is a debt due;³⁵ and a mortgage may be given for future advances or for a contingent debt;³⁶ and if fair, it will be supported. Unless fraudulent it is not void, because it is given for a greater sum than is actually due.³⁷

²⁷ *Mandeville v. Welsh*, 5 Wheat. 277; *Hall v. McDuff*, 24 Me. 311; *Williams v. Stratton*, 18 Miss. 418; *Mounce v. Byers*, 16 Ga. 469; *Robinson v. Urquhart*, 1 Beasl. Ch. N. J. 523; *Chase v. Peck*, 21 N. Y. 584; *Hackett v. Reynolds*, 4 R. I. 512. *Contra*, *Shitz v. Dieffenbach*, 3 Penn. St. 233; *Vanmeter v. McFaddin*, 8 B. Monr. Ky. 435.

²⁸ *Manly v. Slason*, 21 Vt. 271; *Ross v. Whitson*, 6 Yerg. Tenn. 50; *Outtan v. Mitchell*, 4 Bibb, Ky. 239; *White v. Casanave*, 1 Harr. & J. Md. 106; *Wynne v. Alston*, 1 Dev. Ch. No. C. 163; *Watson v. Wells*, 5 Conn. 468; *Chase v. Peck*, 21 N. Y. 584; *Skaggs v. Nelson*, 25 Miss. 88; *Tobey v. McAllister*, 9 Wisc. 463. *Contra*, *Philbrook v. Delano*, 29 Me. 410.

²⁹ *Bayley v. Greenleaf*, 7 Wheat. 46; *Clark v. Hunt*, 3 A. K. Marsh. Ky. 553; *Cole v. Scott*, 2 Wash. C. C. 141; *Kauffelt v. Bower*, 7 Serg. & R. Penn. 64.

³⁰ *Aldridge v. Dunn*, 7 Blackf. Ind. 249; *Taylor v. Baldwin*, 10 Barb. N. Y. 626; *Webb v. Robinson*, 14 Ga. 216; *Roberts v. Rose*, 2 Humphr. Tenn. 145.

³¹ *Selby v. Stanley*, 4 Minn. 65; *Boon v. Murphy*, 6 Blackf. Ind. 272; *Williams v. Roberts*, 5 Ohio, 35; *Gilman v. Brown*, 4 Wheat. 255.

³² *Cutts v. York Co.*, 18 Me. 201.

³³ *Langdon v. Bull*, 9 Wend. N. Y. 80; *Brown v. Bement*, 8 Johns. N. Y. 96; *Portland Bank v. Stubbs*, 6 Mass. 422; *Clow v. Woods*, 5 Serg. & R. Penn. 275; *Walsh v. Baker*, 1 Penn. 57; *Goodnow v. Dunn*, 21 Me. 86.

³⁴ *Rich v. Roberts*, 48 Me. 548; *Forest v. Tinkham*, 29 Ill. 141; *Fromme v. Jones*, 13 Iowa, 474; *Eddy v. Caldwell*, 7 Minn. 225; *Bevans v. Bolton*, 31 Mo. 437; *Woodruff v. Phillips*, 10 Mich. 500; *Hill v. Gilman*, 39 N. H. 88; *Dukes v. Jones*, 6 Jones, No. C. 14; *Troy v. Smith*, 33 Ala. N. s. 469.

³⁵ *Smith v. People's Bank*, 25 Me. 185.

³⁶ *Conard v. Atlantic Ins. Co.*, 1 Pet. 386; *Garber v. Henry*, 6 Watts, Penn. 57; *Stewart v. Stocker*, 1 Watts, Penn. 135; *Adams v. Wheeler*, 10 Pick. Mass. 199; *Commercial Bank v. Cunningham*, 24 Pick. Mass. 270; *Leeds v. Cameron*, 3 Sumn. C. C. 488; *Ter-Hoven v. Kerns*, 2 Penn. St. 96; *Lyle v. Ducomb*, 5 Binn. Penn. 585.

³⁷ *Gordon v. Preston*, 1 Watts, Penn. 385.

890. A *conditional sale* is one which depends for its validity upon the fulfillment of some condition. It not unfrequently happens that a debtor conveys his land to his creditor absolutely, and then the creditor agrees to convey the land to the debtor upon condition, and this has much resemblance to a mortgage; for, if the debtor pays the amount stipulated for, he will be entitled to the land, as when he pays the amount due on the mortgage he will have a right to it. But they are distinguishable, and this is the test. If any debt remains after the debtor has made his conveyance, the transaction is a mortgage, but if the debt is extinguished by mutual agreement, or the money advanced is not loaned, but the grantor has a right to refund it in a given time, and have a conveyance, this is a conditional sale.³⁸

It is, however, a question of evidence upon all the facts of the case, whether the contract is a mortgage or a conditional sale, and if the price is grossly inadequate, the court will consider it a mortgage.³⁹

891. A *warrant of attorney* is an instrument in writing addressed to one or more attorneys therein named, authorizing them generally to appear in any court, or in some specified court, on behalf of the person giving it, and to confess judgment in favor of some person therein named, in an action of debt, and usually containing a stipulation not to bring any writ of error nor to file a bill in equity, so as to delay him.

This authority is generally qualified by reciting a bond, which usually accompanies it, together with the condition annexed to it, or by a written defeasance, stating the terms upon which it was given, and restraining the creditor from making use of it contrary to such conditions.

It is generally given under seal, though it is said this is not indispensable.⁴⁰

In general it is not revocable, but death destroys its validity, for no judgment can be entered against a dead man.⁴¹

The virtue of a warrant of attorney is spent by the entry of one judgment, and a second judgment entered on the same warrant is irregular.⁴²

892. In its proper technical sense a *covenant* is an agreement between two or more persons, entered into in writing and under seal, by which either party stipulates for the truth of certain facts, or promises to perform or give something to the other, or to abstain from the performance of certain things.⁴³

A covenant differs materially from an *assumpsit*; the former must be under seal, the latter may be oral or in writing not under seal. In a covenant no consideration need be shown; in *assumpsit* the contract is invalid unless a consideration appears. The act of limitation bars an *assumpsit*; it does not affect a covenant, though lapse of time will be presumption of performance.

893. A *letter or power of attorney* is a written instrument, by which one or more persons, called constituents, authorize one or more other persons, called attorneys, to do some lawful act by the latter, for or instead and in the place of the former.⁴⁴

³⁸ *Robinson v. Cropsey*, 2 Edw. Ch. N. Y. 138; *Page v. Foster*, 7 N. H. 392; *Robertson v. Campbell*, 2 Call, Va. 354; *Wheeland v. Swartz*, 1 Yeates, Penn. 579; *Hillhouse v. Dunning*, 7 Conn. 143. See *Johnson v. Clark*, 5 Ark. 321; *Holmes v. Grant*, 8 Paige, Ch. N. Y. 243; *Hoopes v. Bailey*, 28 Miss. 328; *Slowey v. McMurray*, 27 Mo. 113.

³⁹ *Conway v. Alexander*, 7 Cranch, 218; *West v. Hendrix*, 28 Ala. n. s. 226; *Davis v. Stonestreet*, 4 Ind. 101; *Russell v. Southard*, 12 How. 139.

⁴⁰ *Kennerly v. Mussen*, 5 Taunt. 264; *Overton v. Tyler*, 3 Penn. St. 346. But see *Cutler v. Haven*, 8 Pick. Mass. 490.

⁴¹ *Coke*, Litt. 52, b.

⁴² *Martin v. Rex*, 6 Serg. & R. Penn. 296; *Fairchild v. Camac*, 3 Wash. C. C. 558.

⁴³ 2 *Sharswood*, Blackst. Comm. 304; *Bacon, Abr. Covenant*.

⁴⁴ 1 *Mood. Cr. Cas.* 52, 70.

The authority is either general, to transact all the business of the principal, or special, to do some particular business, as to collect a debt.

It is revocable or irrevocable; the former, when no interest is conveyed to the attorney in the matter of which it is the subject. It is irrevocable when the attorney has such an interest; as, when it is given as part security.

It may be by parol or under seal. The attorney cannot in general execute a sealed instrument so as to bind his constituent unless the power be under seal.⁴⁶ Powers of attorney are to be strictly construed, and the execution must conform to the power or it will be void.⁴⁶

894. For most commercial purposes contracts are made in writing not under seal, and these, like contracts made orally, are called *simple contracts*, for there is no difference as to their effects except perhaps in consequence of statutory provisions and as to the manner in which they are to be proved. This class is called *parol contracts*.

The principal contracts which must of necessity be in writing, and not under seal, are the following: Bills of exchange, promissory notes, bills of lading, bills of adventure, charter party, articles of agreement, letters.

895. A *bill of exchange* is an open letter of request from, and order by, one or more persons on one or more others, to pay to some third person or persons a sum of money therein mentioned on demand, or at a future time therein specified. The nature and use of this instrument will be fully pointed out when we come to treat of special contracts.⁴⁷

896. The nature of *promissory notes* will also be considered when we treat of particular contracts. It is required here only to give the definition of a promissory note. It is a written promise not under seal by one or more persons, called the makers, to pay to one or more persons, denominated the payees, for a valuable consideration, a sum of money at a future time, unconditionally.

897. A *bill of lading* is a memorandum or acknowledgment in writing, signed by the captain or master of a ship or other vessel, that he has received in good order on board of his ship or vessel therein named, at the place therein mentioned, certain goods therein specified, which he promises to deliver in like good order (the dangers of the sea excepted), at the place therein appointed for the delivery of the same, to the consignee therein named, or to his assigns, he or they paying freight for the same;⁴⁸ or it is the written evidence of a contract for the carriage of goods sent by water for a certain freight.⁴⁹

It is both a receipt and a contract. In so far as it admits the character, quality, condition or amount of the goods when they were received, it is a mere receipt, and may be explained or contradicted by parol evidence;⁵⁰ but as respects the agreement to deliver, it is a contract, and its terms cannot be varied by other evidence.

898. A bill of lading ought to contain the name of the consignor, the name of the consignee, the name of the master of the vessel, the name of the vessel, the places of departure and destination, the price of the freight, and in the margin the marks and number of the things shipped, and also an agreement to de-

⁴⁶ *Smith v. Perry*, 5 Dutch. N. J. 74.

⁴⁶ *Trout v. Emmons*, 29 Ill. 433; *Trudo v. Anderson*, 10 Mich. 357; *Woodbury v. Larned*, 5 Minn. 339; *Dupont v. Wertheman*, 10 Cal. 354.

⁴⁷ Beyond, **1129**.

⁴⁸ By the French authors a bill of lading is called a *connoissement*; by Italians, *polizza do carrico*; and by Latin authorities on the continent of Europe, *apocha oneratoria*.

⁴⁹ 1 H. Blackst. 359.

⁵⁰ *Nelson v. Woodruff*, 1 Black, 156; *Clark v. Barnwell*, 12 How. 272; *Shepherd v. Naylor*, 5 Gray, Mass. 591; *Meyer v. Peck*, 33 Barb. N. Y. 532; *Sears v. Wingate*, 3 All. Mass. 103.

liver them at the place of destination. It should be dated and signed by the master. It must be in writing, and need not be under seal.

It is usually made in three originals or parts. One of them is commonly sent to the consignee, with the goods, on board; another is sent to him by mail or other conveyance, and the third is retained by the merchant or shipper. The master should also take care to have another part for his own use.⁵¹

899. The bill of lading may be assigned, and the assignee takes all the rights of the assignor, unless there has been some restriction in the assignment, or it has been assigned upon some condition. As there are several parts, there may be several assignments, and in that case a difficulty arises to ascertain who is entitled to the goods. The rule of law on the subject is, that the goods pass by the bill first endorsed; and for this there are two reasons: the first, that after a party has parted with his rights, he cannot transfer any other to another person; and secondly, when all parties are equal in equity, he who has the advantage at law has the best right.⁵²

This assignment is always understood as leaving the goods liable for the freight, and, in some cases, to the right of the sellers to stop them *in transitu*.⁵³

Where a bill of lading is assigned for value, it is conclusive between the owners of the vessel and the assignee as to the quantity of goods shipped.

900. A *bill of adventure* is a writing signed by a merchant to testify that the goods shipped on board a certain vessel belong to another person, who is to take the hazard, the subscriber signing only to oblige himself to account to him for the produce.

901. A *charter party* is a contract in writing, by which the owner of a ship or other vessel lets the whole, or a part of her, to a merchant or other person, for the conveyance of goods on a particular voyage, in consideration of the payment of freight. This instrument ought to contain the name and tonnage of the vessel, the name of the captain, the names of the letter and the charterer, the place and time agreed upon for loading and discharge, the price of the charter, the demurrage or indemnity in case of delay, and such other conditions as the parties may agree upon. It should be dated and signed.⁵⁴

It may either provide that the charterer hires the whole capacity of the vessel, in which case it is in its nature a contract whereby the owner agrees to carry a cargo which the charterer agrees to provide, or it may provide for an entire surrender of the vessel to the charterer, who then takes possession in such a manner as to have all the rights and incur all the liabilities which grow out of possession.

902. *Articles of agreement* relate either to real or personal estate, or to both. An article is a memorandum of an agreement, reduced to writing, to make some future disposition or modification of property; and such an instrument will create a trust or equitable estate, of which a specific performance will generally be decreed in chancery.⁵⁵

903. This instrument should contain the name and character of the parties; the subject matter of the contract; the covenants which each of the parties binds himself to the other to perform; the date; the signatures of the parties.

The *parties* should be named, and their additions, as, of the city of Philadel-

⁵¹ Abbott, Shipp. 217.

⁵² Abbott, Shipp. 387; Caldwell v. Ball, 1 Term, 205.

⁵³ 2 Kent, Comm. 548; Abbott, Shipp. 331; Bacon, Abr. *Merchant* (L); 1 Bell, Comm. 5th ed. 542, 545.

⁵⁴ Abbott, Shipp. pt. 3, c. 1, s. 1 to 6; Pothier; Pardessus, Dr. Com. n. 708; Marshall, Ins. 407. A charter party may be made under seal, or simply in writing not sealed. Lawes Charter Parties, 2.

⁵⁵ Cruise, Real Prop. tit. 32, c. 1, s. 31; tit. 12, c. 1.
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phia, merchant, should be expressed in order to identify them. It should also be stated which persons are of the first, second, or other part. A confusion in this respect may occasion difficulties.

The *subject matter* of the contract ought to be set out in clear and explicit language, and its consideration should be properly stated. What one party is to do should be set out in a consecutive series of articles, and then, in another set, what the other binds himself to do. The time and place of performance ought to be mentioned; and when goods are to be delivered, it ought to be provided at whose expense they should be removed, for there is a difference in the delivery of light and bulky articles. The seller of bulky articles is not in general bound to deliver or remove them, unless he specially agrees to do so.⁵⁶

The *promises* of each party ought to be correctly stated, as a mistake in this respect leads to difficulties which might have been obviated. Too much precision cannot be attained.

The instrument should be truly *dated* as to time, and though the place where it is made be not indispensable, yet it is highly proper it should be mentioned.

It should be *signed* by the parties or their agents. When an agent executes it, he should sign it in the name of his principal and not his own, or he may perhaps make himself unintentionally responsible personally. The proper way to sign is thus: A B (the principal's name), by his agent or attorney, C D.

This instrument may be made under seal, and frequently it is so made.

904. A contract may be made by persons who are absent from each other, as well as by those who are present. This is done by *correspondence*, or by letters sent by one person to another, and the answers.

The difficulty, in cases of this kind, is to know when the contract has actually been completed. If, for example, A writes from Philadelphia to B in New Orleans, offering to buy a thousand bales of cotton at a certain price, and before he receives B's answer he changes his mind, and writes to him declining the contract and withdrawing his offer, there is no contract, although B may have assented to it before A wrote his letter withdrawing the offer, because in fact there was no consenting mind when A received the acceptance of his offer.⁵⁷

When an offer is made by letter, and it is not accepted unconditionally, but the precise terms are changed, even in the slightest degree, there is no contract.⁵⁸

905. Although doubtless it is more prudent to reduce the terms of every contract to writing, particularly when they are of much importance and are not to be executed immediately, yet, in the affairs of life, it is almost impossible to pursue this course, and many contracts are daily made without any such precaution. Every man, every day, makes one or more of these contracts, without feeling any inconvenience, and indeed without observing the frequency of such engagements. You go into a store and buy a book, into a hotel and eat your dinner, into a steamboat to go on a journey, into an omnibus to go from one part of the town to another; in all these cases, and a thousand similar ones, you make a contract without scarcely noticing it.

The principal difference between oral contracts, or those not in writing, and

⁵⁶ *Jewett v. Warren*, 12 Mass. 300; *Evarts v. Butler*, Brayt. Vt. 215.

⁵⁷ *McCulloch v. Eagle Ins. Co.*, 1 Pick. Mass. 278; *Thayer v. Ins. Co.*, 10 Pick. Mass. 326. See before, **579**.

⁵⁸ *Eliason v. Henshaw*, 4 Wheat. 225.

those in writing, is in the mode of proof. In written contracts, the writing is alone evidence of them, and no oral agreement will be admitted to alter, change or contradict what the parties have reduced to writing; they are presumed to have put all into their agreement, and all *pourparlers*, or conversations, or a previous *colloquium*, in the negotiation of the agreement, are merged in the written contract.⁶⁰

But parol evidence is admissible to defeat a written instrument, on the ground of fraud or mistake, or to apply it to its proper subject-matter; or, in some instances, as ancillary to such application, to explain the meaning of doubtful terms, or to rebut presumptions arising extrinsically. In these cases the parol evidence does not usurp the place or arrogate the authority of written evidence, but either shows that the instrument ought not to operate at all or, is essential in order to give the instrument its legal effect.⁶⁰

906. Contracts not in writing may be made *expressly* by the consent of the contracting parties distinctly stated. In this kind of contracts, like those which are reduced to writing, there must be competent contracting parties; a subject-matter of the agreement; a lawful consideration, or, when that is not requisite, as in the case of a gift, a delivery of the thing; and an agreement of the parties.

907. But the principal contracts not in writing are to be classed among *implied* contracts. These are such as reason and justice dictate, and which the law presumes every man undertakes to perform; as, if a man employs another to do business for him or perform any work, the law implies that the former contracted or undertook to pay the latter as much as his labor deserved; or, if one takes up goods from a tradesman, without any agreement or price, the law presumes that he will pay their value; or even without any active act of his own, a man may make a contract; as, if a baker were to send to your house every morning, for any given time, a loaf of bread, or a publisher of a newspaper his paper, and they were used in your family, even without your knowledge, but for your benefit, you would be bound to pay for their just value.⁶¹

⁶⁰ 1 Greenleaf, Ev. § 275; 1 Spence, Eq. Jur. 553; Dig. 20, 1, 4; Dig. 22, 4, 4; 1 Phillips & A. Ev. 753.

⁶¹ *Lessons v. Gilbert*, 1 Brayt. Vt. 75; *Arberry v. Noland*, 2 J. J. Marsh. Ky. 421; *Gower v. Sterner*, 2 Whart. Penn. 75; *Comm. v. Blaine*, 4 Binn. Penn. 186.

⁶² 2 Sharswood, Blackst. Comm. 443; Comyn, Dig. *Action upon the case upon Assumpsit*, A. 1; *Com. Dig. Agreement*. In *Ogden v. Saunders*, 12 Wheat. 341, Marshall, C. J., says: "A great mass of human transactions depend upon implied contracts, which are not written but grow out of the acts of the parties. In such cases the parties are supposed to have made those stipulations which, as honest, fair and just men, they ought to have made." In the Roman law there is a species of contract somewhat resembling implied contracts, but differing from them in many particulars.

Quasi-contracts, a term used in the civil law. A quasi-contract is the act of a person, permitted by law, by which he obligates himself toward another, or by which another binds himself to him, without any agreement between them.

By Article 2272 of the Civil Code of Louisiana, which is translated from Article 1371 of the Code Civil, quasi-contracts are defined to be "the lawful and purely voluntary acts of a man, from which there results any obligation whatever to a third person, and sometimes a reciprocal obligation between the parties." In contracts, it is the consent of the contracting parties which produces the obligation; in quasi-contracts no consent is required, and the obligation arises from the law or natural equity, on the facts of the case. These acts are called quasi-contracts, because, without being contracts, they bind the parties as contracts do.

Quasi-contracts may be multiplied almost to infinity. They are, however, divided into five classes: such as relate to the voluntary and spontaneous management of the affairs of another without authority; the administration of tutorship; the management of common property; the acquisition of an inheritance; and the payment of a sum of money or other thing by mistake, when nothing was due.

Negotiorum gestio. When a man undertakes, of his own accord, to manage the affairs of

But this rule would not authorize any one to do work for another without his knowledge or consent, so as to make the latter liable for the amount; as, for example, where one without the request or privity of the owner saved his property from fire,⁶² or where one put repairs on the house of another without his privity or consent.⁶³ In these cases the party has no remedy.

Nor will the law imply any promise contrary to the express declarations of the party at the time.⁶⁴ A merely voluntary and unauthorized payment of the debt of another does not raise any implied promise of payment, for the debtor may prefer that the original creditor should retain the debt.

908. These implied contracts may be made by any person *sui juris*, and by a corporation aggregate.⁶⁵

909. There are various contracts which cannot be entered into except in

another, the person assuming the agency contracts the tacit engagement to continue it and complete it, until the owner shall be in a condition to attend to it himself. The obligation of such a person is: *first*, to act for the benefit of the absentee; *second*, he is commonly answerable for the slightest neglect; *third*, he is bound to render an account of his management. Equity obliges the proprietor, whose business has been well managed: *first*, to comply with the engagements contracted by the manager in his name; *second*, to indemnify the manager in all the engagements he has contracted; and, *third*, to reimburse him all useful and necessary expenses.

Tutorship or guardianship is the second kind of quasi-contracts, there being no agreement between the tutor and minor.

When a person has the management of a common property owned by himself and others not as partners, he is bound to account for the profits, and is entitled to be reimbursed for the expenses which he has sustained by virtue of the quasi-contract which is created by his act, called *communio bonorum*.

The fourth class is the *aditio hæreditatis*, by which the heir is bound to pay the legatees, who cannot be said to have any contract with him or with the deceased.

Indebiti solutio, or the payment to one of what is not due to him, if made through any mistake in fact, or even in law, entitles him who made the payment to an action against the receiver for repayment, *condictio indebiti*. This action does not lie, if the sum paid was due *ex equitate*, or by a natural obligation; or, if he who made the payment knew that nothing was due, for *qui consulto dat quod non debebat, præsumitur donare*.

Each of these quasi-contracts has an affinity with some contract; thus the management of the affairs of another without authority, and tutorship, are compared to a mandate; the community of property, to a partnership; the acquisition of an inheritance, to a stipulation; and the payment of a thing which is not due, to a loan.

All persons, even infants and persons destitute of reason, who are consequently incapable of consent, may be obliged by the quasi-contract, which results from the act of another, and may also oblige others in their favor; for it is not consent which forms these obligations; they are contracted by the act of another, without any act on our part. The use of reason is indeed required in the person whose act forms the quasi-contract, but it is not required in the person by whom or in whose favor the obligations which result from it are contracted. For instance, if a person undertakes the business of an infant or a lunatic; this is a quasi-contract, which obliges the infant or the lunatic to the person undertaking his affairs for what he has beneficially expended, and reciprocally obliges the person to give an account of his administration or management.

There is no term in the common law which answers to that of quasi-contract; many quasi-contracts may doubtless be classed among implied contracts; there is, however, a difference between them, which an example will make manifest. In case money should be paid by mistake to a minor, it may be recovered from him by the civil law, because his consent is not necessary to a quasi-contract; but by the common law, if it can be recovered, it must be upon an agreement to which the law presumes he has consented, and it is doubtful, upon principle, whether such recovery could be had. Bouvier, Law. Dict. *Quasi-contract*.

⁶² *Bartholomew v. Jackson*, 20 Johns. N. Y. 28.

⁶³ *Caldwell v. Encas*, 2 Const. So. C. 348; *Hart v. Norton*, 1 McCord, So. C. 22. See *Pinchon v. Delaney*, 2 Yeates, Penn. 22.

⁶⁴ *Whiting v. Sullivan*, 7 Mass. 107.

⁶⁵ *North Whitehall v. South Whitehall*, 8 Serg. & R. Penn. 117; *Chestnut Hill Turnp. Co. v. Rutter*, 4 Serg. & R. Penn. 16; *Baptist Church v. Mulford*, 3 Halst. N. J. 182; *Dunn v. St. Andrew's Church*, 14 Johns. N. Y. 118; *Bank of Columbia v. Patterson*, 7 Cranch 297.

writing; these will be considered when we come to examine the provisions of the statutes of frauds.

910. To prevent frequent frauds and perjuries of persons who pretended that certain contracts had been made, and who afterward supported them by perjured witnesses, the English statute of 29 Car. II, c. 3, was passed. Most of the principles of this statute have been re-enacted, with certain alterations and modifications, in the greater number of the states of the Union. There is, however, a great difference between these enactments. It would be extremely difficult to examine all of them in detail, and they would not perhaps repay the trouble of studying them. The fourth section of the English statute, which requires that the contract should be in writing, applies to the following cases: It provides that no action shall be brought—

Whereby to charge any executor or administrator, upon any special promise, to answer out of his own estate; or

Whereby to charge the defendant, upon any special promise, to answer for the debt, default, or miscarriage of another person; or

To charge any person upon any agreement made upon consideration of marriage; or

Upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them; or

Upon any agreement that is not to be performed within the space of one year from the making thereof; or

Unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, signed by the party to be charged therewith, or some person by him thereunto lawfully authorized.

911. *Executors and administrators* are liable for the debts of the deceased persons whom they represent only in their representative capacity, to the extent of the assets which have actually come to their hands, or for which they may be lawfully charged. If they make any promise to pay such debts, it applies only to such assets. But the executor or administrator may, if he will, undertake to pay the debt out of his own estate; in this case, to prevent perjuries, the statute requires that the promise shall be in writing, and this writing must state the consideration upon which the agreement is founded.⁶⁵

Where the executor has given a bond to the judge of probate to pay all debts and legacies, an oral promise to pay a debt is held not to be within the statute, for, by giving the bond, he is estopped to deny that there is a sufficiency of assets.⁶⁷

912. Promises of the second kind are called *guaranties*. A guaranty is a promise made upon a good consideration, to answer for the payment of some debt, or the performance of some duty, in case of the failure of another person, who is, in the first instance, liable to such payment or performance.⁶⁸

The contract of guaranty is strictly in the alternative—an undertaking to pay if the principal debtor does not.

When the principal debt exists before the promise of the guarantor, the undertaking is original, and not within the statute in the following cases:

When it is made in consideration of the discharge of the principal debtor,⁶⁹ for a promise cannot be collateral without a principal obligation, or in consideration of some new benefit to the promisor, or loss to the promisee;⁷⁰ or on a consideration moving from the debtor to the promisor.

⁶⁵ Addison, Contr. 107; Saunders v. Wakefield, 4 Barnw. & Ald. 601. See Patton v. Williams, 3 Munf. Va. 59.

⁶⁷ Stebbins v. Smith, 4 Pick. Mass. 97.

⁶⁸ Dole v. Young, 24 Pick. Mass. 250, 252.

⁶⁹ Wood v. Corcoran, 1 All. Mass. 405; Warren v. Smith, 24 Tex. 484.

⁷⁰ Cardell v. McNiel, 21 N. Y. 336.

When the guaranty relates to a future or contemporaneous obligation, the promise is original and not collateral if credit is given exclusively to the promisor;⁷¹ or if the promise is merely to indemnify.⁷² In the first of these cases, the question to whom credit was given is for the jury upon all the facts. The question whether a promise is original or collateral is often quite complicated.

To comply with the requisitions of the statute, the agreement must be in writing; made upon a sufficient consideration; and be to fulfil the engagement of another. The nature of the writing, and what is a sufficient signature, will be examined in another place. Here will be considered the nature of the engagement, or for what debt a guarantor is liable to answer; and the nature of the default or miscarriage for which he agrees to become responsible.

913. The very term guaranty implies that some other is the principal debtor, but a default may arise upon an executory contract, and a promise to pay for goods to be furnished to another is a collateral promise to pay on the other's default, provided the credit, in the first instance, was given exclusively to the other.⁷³

It is a general rule, that when a promise is made by a third person, previous to the sale of goods, or other credit given, or other liability incurred, it comes within the statute, when it is conditional upon the default of another, who is solely liable in the first instance, otherwise not; the only inquiry to ascertain this is, to whom was it agreed that the vendor or creditor should look in the first instance? Many nice distinctions have been made on this subject.

When a party actually purchases goods himself, which are to be delivered to a third person for his sole use, and the latter was not responsible; this is not the case of a guaranty, because the person to whom the goods were furnished never was liable.⁷⁴

Where a person buys goods, or incurs other liability, jointly with another, but for the use of that other, and this fact is known to the creditor, the guaranty must be in writing.

A person may make himself liable by adding his credit to that of another, but conditionally only, in case of the other's default. This sort of promise comes immediately within the meaning of the statute, and, in these cases, is sometimes called a collateral promise.⁷⁵

The liability of a guarantor or surety cannot exceed that of the principal, though it may be less. The remedies may be more extensive. But his obligation is *strictissimi juris*, and cannot be extended beyond the precise terms of the contract. A guaranty may be made for liabilities not yet incurred, as where A promises to guarantee B's notes for purchases up to a certain amount. But this is not binding unless it is accepted or acted upon. If acted upon by giving credit, the danger of loss to the creditor at once becomes a consideration to support the guaranty. When the original promise is contemporaneous with the guaranty, the same consideration supports them both. A guaranty may be made against torts, under the term miscarriage in the statute.⁷⁶

914. The term *miscarriage*, used in this section, has not the same meaning as the word *debt* or *default*. It comprehends that species of wrongful act, for

⁷¹ Hill v. Raymond, 8 All. Mass. 540; Williams v. Corbet, 28 Ill. 262; Blodgett v. Lowell, 33 Vt. 174; Walker v. Richards, 41 N. H. 388; Tarbell v. Stevens, 7 Iowa, 163.

⁷² Kelsey v. Hibbs, 13 Ohio, St. 340; Stark v. Raney, 18 Cal. 622; Mills v. Brown, 11 Iowa, 314.

⁷³ As to the form of a guaranty, and the difference between an offer to guarantee and a guaranty, see Burge, Sur. c. 2, p. 16; Addison Contr. 107, 114.

⁷⁴ Berkmyr v. Barrell, 1 Salk. 27. See D'Wolf v. Rabaud, 1 Pet. 476.

⁷⁵ Meade v. McDowell, 5 Binn. Penn. 195.

⁷⁶ Doty v. Williams, 14 Johns. N. Y. 381; Churchill v. Perkins, 5 Mass. 541; Hodson v. Wilkins, 7 Me. 113.

the consequences of which the law would make the party civilly responsible. The wrongful riding the horse of another, without his leave and license, and thereby causing his death, is clearly an act for which the party is responsible in damages; and therefore falls within the word *misconduct*. This term is more properly applicable to a ground of action founded upon a tort than to one founded upon a contract; for, in the latter case, the ground of action is, that the party has not performed what he agreed to perform, not that he has misconducted himself in some matter for which by law he is liable. But the words *misconduct* and *default* apply to a promise to answer for another with respect to the non-performance of a duty, though not founded upon a contract.⁷⁷

915. The third clause does not extend to the contract of marriage itself; therefore *promises of marriage* are binding, though not reduced to writing and signed by the party sought to be charged thereon.⁷⁸ But all promises and agreements made by one person in consideration of the completion of a marriage made by another, are within the statute and must be reduced to writing, whether they are executory or executed.⁷⁹

916. The note or memorandum of the "agreement for the sale or purchase of lands, tenements, or hereditaments, or of any interest in or concerning them," must show that there was an agreement, on the part of the vendor, *to sell*, and of the vendee, *to buy*; but no technical language or form of words are requisite; both the subject matter of the sale and the price to be paid for it must be specified.⁸⁰

Numerous questions have arisen as to what shall be considered "lands, tenements, or hereditaments, or any interest in or concerning them." Every contract for the conveyance of land, whatever may be the consideration of it, is a contract for the *sale of land* within the meaning of the statute.⁸¹ And an agreement for growing crops, which are not to be taken out immediately, is a contract *concerning land*;⁸² but when the bargain is that the crop shall be removed immediately out of the ground, it will be considered a contract for the sale of personal chattels.⁸³

An easement in land is an interest within the statute,⁸⁴ but not so a mere license for a time to use the land to store goods or crops, to pass over or to cut trees.⁸⁵

917. *Of promises not to be performed within one year.* To bring an agreement within this clause it must appear either by express agreement, or clearly from the subject matter and the circumstances of the case, that the intention and understanding of the parties was that the agreement was not in any event to be

⁷⁷ *Kirkham v. Marter*, 2 Barnew. & Ald. 516.

⁷⁸ *Harrison v. Cage*, 1 Ld. Raym. 386; Bacon, Abr. *Agreements*, C 3.

⁷⁹ Addison, Cont. 96.

⁸⁰ *Saunders v. Wakefield*, 4 Barnew. & Ald. 601; *Hughes v. Parker*, 8 Mees. & W. Exch. 247.

⁸¹ *Frowman v. Gordon's Heirs*, Litt. Sel. Cas. Ky. 193.

⁸² *Crosby v. Wadsworth*, 6 East, 602; *Emerson v. Heeliss*, 2 Taunt. 38.

⁸³ *Parker v. Stanilands*, 11 East, 362; *Warwick v. Bruce*, 2 Maule & S. 205. This whole question is involved in doubt, and the decisions are conflicting. A contract for growing trees is held to be an interest in land in *Putney v. Day*, 6 N. H. 431; contra *Nettleton v. Sikes*, 8 Metc. Mass. 34. Growing wheat is held to be a chattel in *Stewart v. Doughty*, 9 Johns. N. Y. 112. The English cases are still more confused, and Lord Abinger says that, "taking the cases altogether, no general rule is laid down in any one of them that is not contradicted by some other." *Rodwell v. Phillips*, 9 Mees. & W. Exch. 505. See *Bernal v. Hovious*, 17 Cal. 541; *Wright v. Schneider*, 14 Ind. 527; *Matlock v. Fry*, 15 Ind. 483; *McGregor v. Brown*, 10 N. Y. 114; *Harrell v. Miller*, 35 Miss. 700.

⁸⁴ *Hall v. McLeod*, 2 Metc. Ky. 98; *Whitmarsh v. Walker*, 1 Metc. Mass. 313.

⁸⁵ *Mumford v. Whitney*, 15 Wend. N. Y. 380; *Stevens v. Stevens*, 11 Metc. Mass. 313; *Rhodes v. Otis*, 33 Ala. N. S. 578.

performed within a year.⁸⁶ If the agreement may possibly be performed within the year, it is not within the statute, although it will probably take a much longer time.⁸⁷ So where the performance depends upon a contingency which may happen within the year, as an agreement to do or not to do certain things until the death or marriage of a person, it is not within the statute.⁸⁸

To take an agreement out of the statute it is necessary that the contract may be wholly performed within a year. A mere inchoate performance is not enough.

But the payment in case of sale is not necessary to the complete performance, and a sale and delivery of goods or land within the year is not covered by the statute, though payment is to be delayed more than a year.⁸⁹

918. The agreement must be in writing, but the form is not material; and the signature must be affixed to it.

919. The note or memorandum of the agreement need not be *formal*, nor drawn with technical precision; anything under the hand of the party showing that he has entered into the agreement, and upon what terms, is sufficient, although it may be a mere recognition or adoption of a prior contract. An endorsement, or memorandum on the back of a lease, acknowledging that he had agreed to take the premises, or a letter referring to another containing the contract, and agreeing to be bound by it, will be sufficient.⁹⁰

But it must be remembered that there is a distinction between a promise to do a thing at a future time, as, I have no objection to guarantee,⁹¹ and actual present agreement—I do hereby guarantee. In the former case there is no present engagement, and, unless notice of acceptance be given, the parties are not bound, while in the latter there is a positive obligation.

It is held in England that the memorandum must state the consideration of the agreement. In this country the question is undecided. In some of the states the word agreement is used in the statute, and it is held that the consideration must appear,⁹² but in most it is sufficient if the promise or agreement clearly appear, and the consideration need not be stated.⁹³ But in any event, it is enough if the consideration can be understood from the whole agreement. The agreement need not be all on one paper, but may be made by several papers referring to each other, and their connection may be shown by parol evidence.⁹⁴

920. The statute requires that the memorandum or note shall be *signed* by the party to be bound; as it is not required that the signature of the other party should be affixed, the contract may be enforced without it.⁹⁵

⁸⁶ *Herrin v. Butters*, 20 Me. 119; *Peters v. Westborough*, 19 Pick. Mass. 364; *Blanchard v. Weeks*, 34 Vt. 589; *Rogers v. Brightman*, 10 Wisc. 55; *Comstock v. Ward*, 22 Ill. 248.

⁸⁷ *Hill v. Jamieson*, 16 Ind. 125; *Sherman v. Champlain Trans. Co.*, 31 Vt. 162.

⁸⁸ *Lyon v. King*, 11 Metc. Mass. 411; *Hutchinson v. Hutchinson*, 46 Me. 164.

⁸⁹ *Haugh v. Blythe*, 20 Ind. 24; *Stone v. Dennison*, 13 Pick. Mass. 1.

⁹⁰ *Jackson v. Lowe*, 1 Bingh. 9, 2 Bos. & P. 238.

⁹¹ *Symmons v. Want*, 2 Stark. 371; *Mozley v. Tinckler*, 1 Exch. 692; *McIver v. Richardson*, 1 Maule & S. 557.

⁹² *Henderson v. Johnson*, 6 Ga. 390; *Miller v. Cook*, 23 N. Y. 495; *Nabb v. Koontz*, 17 Md. 283; *Rigby v. Norwood*, 34 Ala. n. s. 129; *Cheney v. Cook*, 7 Wisc. 413.

⁹³ *Violett v. Patten*, 5 Cranch, 142; *D' Wolf v. Rabaud*, 1 Pet. 499; *Gilman v. Kibler*, 5 Humphr. Tenn. 19; *Uren v. Pierce*, 12 Miss. 91; *Packard v. Richardson*, 17 Mass. 122; *Gillingham v. Boardman*, 29 Me. 79; *Sage v. Wilcox*, 6 Conn. 81; *Reed v. Evans*, 17 Ohio, 128; *Buckley v. Beardslee*, 2 South. N. J. 570.

⁹⁴ *Lee v. Mahoney*, 9 Iowa, 344; *Ide v. Stanton*, 15 Vt. 686; *Forster v. Hale*, 3 Sumn. C. C. 696.

⁹⁵ *Laythoarp v. Bryant*, 2 Bingh. n. c. 735; *Thorn v. Kempster*, 5 Taunt. 788; *Penniman v. Hartshorn*, 13 Mass. 87; *McCrea v. Purmort*, 16 Wend. N. Y. 460; *Shirley v. Shirley*, 7 Blackf. Ind. 452; *Barstow v. Gray*, 3 Me. 409. *Contra*, *Dykers v. Townsend*, 24 N. Y. 57.

As to the *form* of the signature, it may be by the party subscribing his name at the end of the memorandum, or in any other way, which clearly shows it to be his act; as, I, James Crockford, agree, etc., which is sufficient.⁹⁶ It may be written in ink or with a pencil;⁹⁷ it may be with his name in full or with initials, or with his mark.⁹⁸ But the signature, wherever placed or however written, must, of course, be made with a view of authenticating the document as a concluded contract, and not with a view merely of altering or settling a draft, or approving of propositions and proposals not finally arranged and decided upon.⁹⁹

But the signature may be affixed by an agent, who must, however, be a "person lawfully authorized." The authority of the agent need not be in writing. The law will not presume an authority on the part of the agent, but it may result by implication from the nature of his employment.¹⁰⁰

An auctioneer or his clerk taking down the biddings is the agent of both the seller and buyer, and a delivery of a bought note or a sold note signed by him to the parties is a sufficient compliance with the statute.¹⁰¹ So an officer making a judicial sale is authorized to sign a memorandum as the agent of the buyer.¹⁰²

One contracting party cannot be the agent of the other,¹⁰³ nor can the clerk of one be the agent of the other, without special authority.¹⁰⁴

⁹⁶ Knight v. Crockford, 1 Esp. 190; Taylor v. Dobbins, 1 Strange, 399; Saunderson v. Jackson, 2 Bos. & P. 239; Cabot v. Haskins, 3 Pick. Mass. 83; Clason v. Bailey, 14 Johns. N. Y. 484. *Contra*, Davis v. Shields, 24 Wend. N. Y. 322.

⁹⁷ Geary v. Physick, 5 Barnew. & C. 234.

⁹⁸ Hubert v. Moreau, 12 Moore, 219; Phillimore v. Barry, 3 Nev. & P. 228; 1 Campb. 513.

⁹⁹ Sugden, Vend. & Purch. 159, 179; Merritt v. Clason, 12 Johns. N. Y. 102; Draper v. Pattina, 2 Speers, So. C. 292.

¹⁰⁰ Hodgkins v. Bond, 1 N. H. 284.

¹⁰¹ Lee v. Mahoney, 9 Iowa, 344; Morton v. Dean, 13 Metc. Mass. 385; Boorman v. Jenkins, 12 Wend. N. Y. 566.

¹⁰² Hegeman v. Johnson, 35 Barb. N. Y. 200; Stewart v. Galvin, 31 Mo. 36.

¹⁰³ Wright v. Dannah, 2 Campb. 203.

¹⁰⁴ Graham v. Mason, 7 Scott, 769; Graham v. Fretwell, 4 C. B. 25.

CHAPTER VII.

OF SALES.

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921. After having taken a general view of contracts, it seems proper to consider some of the principal contracts, each by itself, so as to form a more correct and definite idea of the mode of acquiring title to personal property. These

are the contracts: Of sale, of bailments, of bills of exchange, of promissory notes, of marine insurance, of life insurance, of insurance against fire, of botto-try and respondentia, of games, of agency, of suretyship, of partnership.

922. Traditions and the observations made among civilized nations agree with the speculations which show that barter preceded the contract of sale. It was not always convenient to have objects which would be taken in exchange for others, and this want was the cause of the invention of money. In choosing the material to make money, which should be the sign of value of all objects, it was desirable to select one which would not be easily destroyed by use, and which might be conveniently divided. Metal was found very suitable for this purpose, and, by selecting a precious metal which might be carried without inconvenience, the end was attained. Gold, silver, and some less precious metals, have been used for this purpose. In order to avoid delay and inconvenience in regulating their weight and quality when passed, the governments of the civilized world have caused them to be manufactured in certain portions, and marked with a stamp which attests their value; this is called *money*.¹

These researches on the subject of money bring us to the conclusion that the price of a thing sold should be paid in money. The invention of money and the contract of sale are therefore coeval.

923. A *sale* is an agreement by which one of the contracting parties, called the seller, gives a thing and passes a title to it in exchange for a certain price in current money to the other party, who is called the buyer or purchaser, who, on his part, agrees to pay such price.²

This contract differs from a barter or exchange in this, that in the latter the price or consideration, instead of being paid in money, is paid in goods or merchandise susceptible of a valuation. It differs from accord and satisfaction, because in that contract the thing is given for the purpose of quieting a claim and not for a price. An onerous gift, when it imposes as a burden the payment of a sum of money, and is accepted by the donee, is in the nature of sale; when it requires the delivery of some other thing as a condition precedent, it is in the nature of a barter. And when partition is made between two or more joint tenants of a chattel, it would seem the contract is in the nature of a barter.

To constitute a valid sale there must be proper parties, a thing which is the object of the contract, a price agreed upon, the consent of the contracting parties, the performance of certain acts required to complete the contract.

924. In treating of the persons capable of entering into a contract, we considered the capacities of persons for such a purpose; little, therefore, need be said here. As a general rule, all persons *sui juris*, or those who have all the rights of freemen without being under the control of another, may be either buyers or sellers. Corporations may also buy and sell. But to this general rule there are several exceptions.

There is a class of persons who are incapable of purchasing, except *sub modo*, as infants and married women.

Another class, who, in consequence of their peculiar relation with regard to the owner of the thing sold, are totally incapable of becoming purchasers while

¹ 1 Coke, Litt. 207; 1 Hale, Hist. Com. L. 188; Pardessus, n. 22; Domat, liv. Prél. t. 3, c. 2, n. 6.

² Noy, Max. ch. 42; Sheppard, Touchst. 244; Pardessus, Dr. Com. n. 6; 1 Duvergier, Dr. Civ. Fr. n. 7; La. Civ. Code, art. 2414; Pothier, Vente, art. Prél.; Vail v. Strong, 10 Vt. 457. Mr. Chancellor Kent, 2 Com. 268, says: "A sale is a contract for the transfer of property from one person to another for a valuable consideration." This applies to a barter as well as to a sale; the barter of one horse for another would, according to this definition, be a double sale.

that relation exists; these are trustees, guardians, assignees of insolvents, and generally all persons who, by their connection with the owner or by being employed concerning his affairs, have acquired a knowledge of his property, as attorneys, conveyancers, and the like.³

925. There must be a *thing* which is the *object* of the sale; for if the thing sold at the time of the sale has ceased to exist, it is clear that there can be no sale. If, for example, A sells his horse to B, and at the time of the sale the horse was dead, unknown to both parties; or if, A and B being in Philadelphia, the former sells his house situated in Cincinnati to the latter, both parties supposing the house to exist, when, in fact, it was then burned down, it is manifest that there was no sale, because there was not a thing to be sold.⁴ Again, if A sell to B the foal of which his mare is then pregnant, and, in consequence of an abortion, no foal is born, there is no sale.⁵

But a sale may be made of anything which, though without present existence, is the natural product of something now owned by the seller, as the crops to be gathered off the seller's farm.⁶ But a mere possibility or contingency not depending on any present right or property cannot be sold; as, for instance, the future crops on a farm which I do not own, or a possibility of inheritance or succession.⁷

The thing which is the object of the sale must be a thing in commerce, for things which are not in commerce, as the air, the water of the sea, a port, and the like, cannot be sold.

Not only a thing in possession may be sold, but a chose in action, as a debt, and when such a debt is sold, the sale entitles the buyer to all the securities which the seller holds for its payment, they being mere accessories to it.⁸

There must be an agreement as to the specific goods which form the basis of the contract of sale; in other words, to make a perfect sale, the parties must have agreed, the one to part with the title to a *specific article*, and the other to acquire such title; and when they have so agreed, the purchaser takes the thing sold, in the same state in which it was held by the vendor, subject to the same liabilities;⁹ and accessories generally pass with the principal article sold; as, the sale of the materials of a newspaper establishment will carry with it, as an accessory, the subscription list.¹⁰ But it is not always easy to say what articles are principal and what accessories;¹¹ a boat, it has been held, is not an accessory or an appurtenance to a vessel.¹² The general rule is, that a sale will only operate to pass the vendor's title; if, therefore, he is not the owner, no title passes, but the lawful owner may reclaim the goods.¹³ By the old common law, sale of goods in market overt passed a good title against the owner; but this rule has never been adopted in this country. But an unauthorized sale by one not the owner will be good against the owner where the owner, by his carelessness, has lost the possession, and allowed the vendor to hold the property and to appear to the world as owner. Thus, if the owner entrusts goods to his

³ *Barker v. The Marine Ins. Co.*, 2 Mas. C. C. 369.

⁴ *Rice v. Dwight Mfg. Co.*, 2 Cush. Mass. 80; *Franklin v. Long*, 7 Gill & J. Md. 407; *Allen v. Hammond*, 11 Pet. 63.

⁵ Dig. 18, 1, 8. See *McCarty v. Blevins*, 5 Yerg. Tenn. 195; *Smith v. Atkins*, 13 Vt. 461.

⁶ *Trull v. Eastman*, 3 Metc. Mass. 121; *Carter v. James*, 9 Johns. N. Y. 143; *Smith v. Atkins*, 18 Vt. 461; *McCarty v. Blevins*, 5 Yerg. Tenn. 195.

⁷ *Fitch v. Fitch*, 8 Pick. Mass. 480; *Wheeler v. Wheeler*, 2 Metc. Ky. 474.

⁸ *Foster v. Fox*, 4 Watts & S. Penn. 92.

⁹ *Jones v. Steamboat Commerce*, 14 Ohio, 408.

¹⁰ *McFarland v. Stewart*, 2 Watts, Penn. 111.

¹¹ Coke, Litt. 152, a; Coke, Litt. 121, b, note.

¹² *Starr v. Goodwin*, 2 Root, Conn. 71. But see *Pardessus*, n. 599.

¹³ *Root v. French*, 13 Wend. N. Y. 570; *Buffington v. Gerrish*, 15 Mass. 156.

agent, an unauthorized sale by the agent will bind the owner, if there are no circumstances from which the vendee can infer the want of authority.

926. When a thing is sold which is not specified, the property in the thing is not changed until it has been fully *separated* from the mass from which it was to be taken; as a sale of one hundred bushels of wheat, to be measured out from a heap, passes no property until it has been so measured, and, if it should be destroyed or deteriorated while in that state, the loss will fall upon the seller, *res perit domino*.¹⁴

This separation is merely for the purpose of identification, for it is clear there is no specific one hundred bushels to be the subject of the sale until the separation. This case should be carefully distinguished from a sale of the whole heap, the quantity not being ascertained.

927. To constitute a sale there must be a *price*, which is the consideration in money given for the purchase of a thing. The price must have the three following qualities:

928. The price must be *serious*, or such a one as the seller intends to require to be paid to him; if, therefore, one should sell a thing to another, and, by the same agreement, he should release the buyer from its payment, the contract would not be a sale, but a gift, because, in that case, the buyer never agreed to pay any price, the same agreement by which the title to the thing passed to him discharging him from the obligation to pay for it. As to the quantum of the price, that is altogether immaterial, unless there has been fraud in the transaction.

The price may be so small and grossly inadequate, and the other circumstances such as to afford a necessary presumption of fraud, in which case the sale will be set aside in equity.¹⁵ But merely the smallness of the price, without a presumption of fraud, is not enough, for the owner has a perfect right to sell at any price he sees fit, unless it is a colorable sale to defraud creditors.¹⁶

929. The price must be *certain* and determined, but upon the maxim, *id certum est quod reddi certum potest*, a sale may be valid, although it is agreed that the price of the thing sold shall be determined by a third person.¹⁷ But still there must be a price; if, for example, I sell my watch for the price my father gave for it, and, upon inquiry, it was found my father did not buy it, but received it as a gift from his father, there would be no contract for want of a price or consideration.

And the parties must provide some means by which the price can be exactly fixed independently of themselves, as by leaving it to the estimation of a third person, or fixing it by a future market price. So a sale of a specific article of a quantity not ascertained, the price to depend on the quantity, is a good sale, as the sale of a whole flock of sheep at so much a head.¹⁸

When the parties have not expressed any price in their contract, the presumption of law is, that the thing is sold at its reasonable value, which is its market value at the time and place of sale.¹⁹

¹⁴ Blackburn, Sales, 122; Houdlette v. Tallman, 14 Me. 400; Devane v. Fennell, 2 Ired. No. C. 36; Woods v. McGee, 7 Ohio, 127; Thompson v. Gray, 1 Wheat. 75; Dennis v. Alexander, 3 Penn. St. 50; Young v. Austin, 6 Pick. Mass. 280.

¹⁵ Follett v. Rose, 3 McLean, C. C. 332; Hubbard v. Coolidge, 1 Metc. Mass. 93; Osgood v. Franklin, 2 Johns. Ch. N. Y. 23.

¹⁶ Chick v. Trevett, 20 Me. 462; Townsley v. Sumrall, 2 Pet. 182; Seaman v. Seaman, 12 Wend. N. Y. 381.

¹⁷ Brown v. Bellows, 4 Pick. Mass. 179.

¹⁸ Young v. Austin, 6 Pick. Mass. 280; Crofoot v. Bennett, 2 N. Y. 260; Boswell v. Green, 1 Dutch. N. J. 390; Bogy v. Rhodes, 4 Greene, Iowa, 133; Richmond Iron Works v. Woodruff, 8 Gray, Mass. 447.

¹⁹ Beatty v. Scrivener, 3 T. B. Monr. Ky. 133; Jenkins v. Richardson, 6 J. J. Marsh. Ky. 441; Hill v. Hill, Coxe, N. J. 261; Lyle v. Lyle, 6 Harr. & J. Md. 273.

If the price cannot be reduced to a certainty there is no contract, for there is no consent of the parties to the price.

930. The price must consist in a sum of money which the buyer agrees to pay to the seller, for if it be paid in any other way the contract is not a sale, but an exchange or barter. And bills of exchange, notes and checks are the representatives of money and are a good price.²⁰ But it is only requisite that the agreement should be for payment in money; in the sequel it may be changed, and the creditor may take goods in payment, and the contract will still be a sale.²¹

When a note or bill is taken in payment, it does not operate as an absolute payment or extinguishment of the debt, but is only a conditional payment, unless the parties have agreed otherwise.²² It is not requisite that the money should be paid down, either at the time of the sale or the delivery of the goods; it may be upon a credit, or payable at a future time.²³ But unless so stipulated the sale is understood to be for cash.²⁴

931. By *consent* is meant an agreement to something proposed. It does not consist simply in a vague will to sell or to buy; it must bear on all the conditions which may be suggested by the circumstances of the case, or imagined by the caprice of the contracting parties; thus, the designation of the thing sold, the amount of the price, the terms of payment, and the warranty, either express or implied; unless the consent be given to all these there is no consent.

932. The consent to a sale may be given, in general, as regards personal property, orally as well as in writing, and both will be equally binding; all that is required in those cases is, that both should expressly agree to some certain thing. But the English statute of 29 Car. II, 3, which has been reenacted in most states of the Union, with alterations and amendments, commonly the statute of fraud, enacts, section 17, "that no contract for the sale of any goods, wares and merchandise, for the price of £10 or upward, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something as earnest to bind the bargain, or in part payment, or some note or memorandum in writing, of the said bargain, to be made or signed by the parties to be charged by such contract, or their agents, thereunto lawfully authorized."²⁵

When an executory contract is made for the sale and future delivery of goods yet to be manufactured or upon which work is still to be done, if the contract is for labor and services it is not within the statute; if, however, it is substantially a sale, as where one agrees to sell articles which he is in the habit of making, then it comes within the statute. The decision of this question depends on the particular circumstances of each case.²⁶

933. It not unfrequently happens that the consent of the parties to a contract of sale is given in the course of a correspondence. To make such contract valid both parties must concur in it at the same time; if, therefore, A, in New York, write to B, in New Orleans, offering to purchase one hundred bales of cotton, and A writes to B that he accepts his offer, the contract is

²⁰ *Loomis v. Wainright*, 21 Vt. 520; *Mitchell v. Gile*, 12 N. H. 390.

²¹ *Picard v. McCormick*, 11 Mich. 68.

²² *Sheehy v. Mandeville*, 6 Cranch, 253; *Wallace v. Agry*, 4 Mas. C. C. 342; *Johnson v. Cleaves*, 15 N. H. 332; *Bonnell v. Chamberlain*, 26 Conn. 487; *Glenn v. Smith*, 2 Gill & J. Md. 493.

²³ *Girard v. Taggart*, 5 Serg. & R. Penn. 19.

²⁴ *Cammayer v. United Churches*, 2 Sandf. Ch. N. Y. 186.

²⁵ Before, **910**.

²⁶ *Edwards v. Grand Trunk R. Co.*, 48 Me. 379; *Bennett v. Nye*, 4 Greene, Iowa, 410; *Gilman v. Hill*, 36 N. H. 318; *Downs v. Ross*, 23 Wend. N. Y. 273; *Lamb v. Crafts*, 12 Metc. Mass. 356.

complete from the time the letter of acceptance is mailed.²⁷ The reason for this is, that the party offering must be considered as making the offer during every instant of time the letter is travelling, or perhaps more correctly, the letter means that the writer makes the offer at the time the letter is received, and this is the intention with which he writes it.

934. There is an implied consent to a sale when a party, *by his acts*, approves of what has been done; as, if he knowingly use the goods left at his house by another who intended to sell them, he will, by that act, confirm the sale.

935. The contract of sale, like all other contracts, requires the mutual assent of the parties. A want of assent may be shown in cases of duress, mistake, fraud, misrepresentation, or concealment, either as to the thing sold, as to the price, or as to the sale itself.

936. Both parties must agree upon the *same object* of the sale; if, therefore, one give his consent to buy one thing, and the other to sell another, there is no sale; nor is there any sale when one sells a bag which he believes is full of wheat, and sells it as such, and, in fact, it was full of oats, because there is no consent as to the thing which is the object of the contract. But a sale would be valid, although the purchaser might be mistaken as to the quality of the thing sold, unless there was fraud in the transaction.²⁸

The distinction is, that if the difference between the article ordered and the article sold is so material as to make it substantially a different article, the vendee may avoid the sale on the ground of want of assent or of mistake.²⁹ But if the article is substantially the article ordered, but of inferior quality merely, the remedy is on the breach of warranty.

937. The parties must agree upon the *same price*, for if the seller intends to sell for a greater price than the buyer intends to give, there is no mutual consent; but if the case were reversed, and the seller intended to sell for a less price than the buyer intended and offered to give, the sale would be good for the lesser sum; for he who wants to buy for a greater sum, must be presumed to want to buy for a less, and both parties agree as to this.³⁰ As, if the seller write a letter to the buyer offering to sell one hundred barrels of pork at four cents per pound, and on the same day the buyer write to the seller, offering for the same pork four and a half cents per pound, the contract will be complete on the receipt of the letters by the parties, for the buyer who offered four and a half cents per pound will be presumed to accept the offer of the seller to sell at four.

938. The consent must be on the *sale itself*; that is, one of the parties intends to sell and the other intends to buy. If, therefore, A intended to lease his house for ten years, at three hundred dollars a year rent, and B intended to buy the house for three thousand dollars, payable in yearly installments of three hundred dollars each, there would not be a contract of sale nor a lease.³¹

939. Whether the title shall pass to the purchaser at the time of the sale, or at what other time, depends upon the express or implied agreement of the parties. An agreement for the sale of goods is *prima facie* a bargain and sale

²⁷ *Adams v. Lindsell*, 1 Barnew. & Ald. 681; *Mactier v. Frith*, 6 Wend. N. Y. 108; *Brisban v. Boyd*, 4 Paige, Ch. N. Y. 17; *Palo Alto*, 1 Dav. Dist. Ct. 344; *Hamilton v. Lycoming Ins. Co.*, 5 Penn. St. 339; *Levy v. Cohen*, 4 Ga. 1; *Potter v. Sanders*, 6 Hare, Ch. 1. In Massachusetts it is held that the contract is not complete until the letter of acceptance is received. *McCulloch v. Eagle Ins. Co.*, 1 Pick. Mass. 278; *Thayer v. Ins. Co.*, 10 Pick. Mass. 326. The subject is not free from difficulty, but the doctrine stated in the text is the best supported.

²⁸ *Sweet v. Colgate*, 20 Johns. N. Y. 196; *Borrekins v. Bevan*, 3 Rawle, Penn. 23; *Jennings v. Gratz*, 3 Rawle, Penn. 168.

²⁹ *Conner v. Henderson*, 15 Mass. 319; *Cornelius v. Molloy*, 7 Penn. St. 293; *Williams v. Spafford*, 8 Pick. Mass. 250.

³⁰ *Pothier, Vente*, n. 36.

³¹ *Pothier, Vente*, n. 37.

of those goods; but this arises merely from the presumed intention of the parties, and if it appear that the parties have agreed, not that there shall be a mutual credit, by which the property is to pass from the seller to the buyer, and the buyer is bound to pay the price to the seller, but that the exchange of the money for the goods shall be made on the spot, no property is transferred, for it is not the intention of the parties to transfer any.³²

But when the buyer makes a part payment, or by consent a future day of payment is fixed, the parties clearly manifest an intention that they should have some time to complete the sale by payment and delivery, and, in the meantime, they are trustees for each other, the one of the property in the chattel, and the other in the price.

As a general rule, when the bargain is made for the purchase of goods, and nothing is said about payment and delivery, the property passes immediately, so as to cast upon the purchaser all future risk, if nothing remains to be done to the goods, although he cannot take them away without paying the price.³³

940. The *seller*, or he who transfers the title of a thing to another, called the buyer, in consideration of money to be paid by such buyer to him, binds himself to transfer the title and the property in the thing; that is his principal or rather his only engagement. This engagement is divided into two branches, the obligation to deliver the thing sold, without which the buyer could not exercise the right of property, and to warrant the title, in certain cases, without which the right of property might be disturbed, interrupted, or even totally destroyed. But this warranty applies only when the seller sells the property as his own, and when it is in his possession.

941. In every contract of sale, *delivery* is an important characteristic; but this delivery has several effects, and may be viewed in several aspects. It may operate to pass the title to the vendee, to defeat the lien of the vendor, or it may be subject to the statute of frauds. Its most important effect is to pass the title to the goods; and to do this a delivery, either actual or constructive, is necessary. No sale is complete, so as to vest the title, as long as any thing remains to be done to ascertain the specific article sold. Thus, if a portion of a quantity of goods is sold, as so many bushels of wheat out of the contents of a warehouse, there is no sale until the specific wheat to be sold is set apart and designated and completely identified.³⁴ But this is to be distinguished from the case where a specific article, or all of a certain quantity or mass, is sold, and the price is dependent on the quantity, which remains to be ascertained.

942. A delivery is the transmission of the possession of a thing from one person into the power and possession of another; or it is an execution of a sale, without which the intent of the parties would not be attained.³⁵

Originally, delivery was a clear and unequivocal act of real possession, accomplished by placing the subject to be transferred into the hands of the buyer, or his agent, or into their respective warehouses, vessels, carts, and the like. This *actual delivery* was justly considered as the true badge of transferred property, as importing full evidence, by signs apparent to the senses, of the consent to transfer; preventing the appearance of possession or ownership in the transferer, and avoiding uncertainty and risk in the title of the buyer.

The complications of modern trade, however, render a strict adherence to this

³² *Wilmarth v. Mountford*, 4 Wash. C. C. 79.

³³ *Bloxam v. Sanders*, 4 Barnew. & C. 941; *Bloxam v. Morley*, 4 Barnew. & C. 481.

³⁴ *Courtright v. Leonard*, 11 Iowa, 32; *Ockington v. Richey*, 41 N. H. 275; *Scudder v. Worster*, 11 Cush. Mass. 573; *Golden v. Ogden*, 15 Penn. St. 528. This setting apart is merely to identify the specific article; the fact that the quantity or price is not ascertained does not affect the question of delivery.

³⁵ *Domat*, Lois Civ. l. 1, t. 2, s. 2, n. 5.

rule impossible. Not unfrequently the purchaser cannot take immediate possession, and the seller cannot make an immediate delivery. The bulk of the goods, their situation, as when they are deposited in public custody as a security for duties, or in the hands of a manufacturer for the purpose of having some operation of his art performed upon them to fit them for the market, the distance they are from the place of sale, the frequency of bargains made by correspondents residing in distant countries, and many other obstructions, render it impracticable to receive or to make an actual delivery. In these and such like cases something short of actual delivery is sufficient to transfer the property.

943. When the thing sold is not delivered by the actual removal, it may be transferred in a variety of ways which have the effect of a delivery, and are considered as a proof of it. Acts from which a delivery may be presumed are equivalent to a delivery, at least between the parties. A *symbolical delivery* is, in many cases, equivalent to an actual delivery; as, delivering the keys of a house in which goods are stored will be a delivery of the goods,³⁶ so the sale of a ship by a bill of sale, properly attested, passes the title of a ship at sea.³⁷ In England a distinction has been made between a bill of sale for the transfer of a ship while in the country and a ship at sea; the former is called simply a bill of sale, but when a ship at sea is to be transferred, it is called a grand bill of sale. In this country no such distinction appears to exist.³⁸

944. On an entire contract a delivery of a part of the goods sold for the whole will operate as a good delivery of the whole, so as to vest the property in the purchaser.³⁹ If a portion is delivered, but something in the way of separation still remains to be done to the rest by the seller, the title passes to the part delivered, but the rest is at the risk of the vendor.⁴⁰

945. In some cases no delivery is requisite, as when the property at the time of sale is already in the possession of the vendee.⁴¹

946. A delivery may be absolute or conditional. If the goods are delivered on condition that the title is not to pass until the price is paid, the vendee has no title until the condition is performed, and the vendor may reclaim them against the vendee and his creditors.⁴² So where under an entire contract goods are to be paid for on delivery, the delivery of a part may be regarded as conditional that the whole shall be paid for on delivery of the remainder.⁴³ So where the whole are delivered on the condition of immediate payment, if payment is not made the vendor may immediately reclaim them.⁴⁴

947. When a *place of delivery* has been agreed upon, the delivery must of course be there. But it frequently happens that no place has been mentioned in the agreement, and it cannot be ascertained from the acts of the parties where it ought to be made. In such case the rule is that the delivery is to be made where the thing was when it was sold,⁴⁵ unless indeed it was on its way, being transported from one place to another, and in this last case it must be delivered at its place of destination. But the rule that the thing sold must be

³⁶ *Jordan v. James*, 5 Ohio, 88; *Pleasants v. Pendleton*, 6 Rand. Va. 473. See *Baily v. Ogden*, 3 Johns. N. Y. 399.

³⁷ *Howland v. Harris*, 4 Mas. C. C. 497; *Brinley v. Spring*, 7 Me. 241.

³⁸ *Portland Bank v. Stacey*, 4 Mass. 661.

³⁹ *Shurtleff v. Willard*, 19 Pick. Mass. 202.

⁴⁰ *Gilman v. Hill*, 36 N. H. 311.

⁴¹ *Nichols v. Patten*, 18 Me. 231; *Shurtleff v. Willard*, 19 Pick. Mass. 209.

⁴² *Hill v. Freeman*, 3 Cush. Mass. 257; *Davis v. Bradley*, 24 Vt. 55; *Buson v. Dougherty*, 11 Humphr. Tenn. 50; *George v. Stubbs*, 26 Me. 243; *Sewall v. Henry*, 9 Ala. N. S. 24.

⁴³ *Russell v. Minor*, 22 Wend. N. Y. 259.

⁴⁴ *Norris v. Rexford*, 18 N. Y. 552; *Ferguson v. Clifford*, 37 N. H. 86; *Harris v. Smith*, 3 Serg. & R. Penn. 20.

⁴⁵ *Barr v. Myers*, 3 Watts & S. Penn. 295.

delivered at the place where it was when sold applies only to determinate things, as when I sold you my horse Napoleon; for if the thing be an indeterminate thing, as a horse, which may be any horse, then it must be delivered at the residence of the seller.

Sometimes the place of delivery may be ascertained from the nature of the thing to be delivered, or from the custom or usage of the place, which always forms a part of every contract.⁴⁶

When there are two places of delivery in the alternative, as to deliver cotton in Charleston or Savannah, it is at the option of the seller to deliver at either place, but in that case he must give notice of his election.⁴⁷ According to Pothier, where the contract is to deliver at Charleston and Savannah, one-half must be delivered at each place.⁴⁸

948. The delivery must be made at the *time* agreed upon between the parties; if not then delivered, the vendee need not accept it if time is a material consideration, and may recover damages if he has suffered by the delay. But, in general, time is not considered of the essence of the contract, and the sale is not affected by a delay, unless it is unreasonable. If no time is agreed upon, the delivery must be made whenever required by the vendee, on his paying the price; and even without his paying the price, if the goods were sold on credit, unless indeed in cases where the seller would have a right to stop the things sold *in transitu*.

949. Delivery may be made to the vendee or to his proper agent. The vendor must use due care in ascertaining the authority of the agent, and where the vendee is at a distance must select proper means of transportation. A delivery to a common carrier for carriage to the vendee is a good delivery to the vendee and passes the title to the goods subject to the right of stoppage *in transitu*.⁴⁹

950. The seller is bound to bear all the *expense* attending the delivery; for example, if the thing is pledged at the time it is sold the seller must redeem it, and deliver it to the buyer clear of the lien or pledge. Another example may be mentioned, where goods are in the custom-house or public warehouses, liable for duties to the government, the owner must deliver the goods clear of those duties.

The expense of measuring and weighing articles, when they are sold out of a heap, or a large body from which they are to be separated, must also be borne by the seller. As soon as that is done, and the buyer has notice of it, the seller's expenses are at an end, and the buyer must remove them at his own expense, unless some contrary provision has been made in the contract.

When the vendor has performed all that is necessary on his part to prepare the goods for delivery, the title passes to the vendee, and the goods are at his risk. But while they actually remain in the custody of the vendor, he is a bailee, and, as such, required to take ordinary care of them. But if it is agreed by the terms of the sale that the vendee shall remove the goods in a certain time, after that time the vendor is only liable for fraud or gross negligence.⁵⁰

951. When a determinate object is sold, as the horse Bucephalus, and without any fault of the seller, and before he is in default as to the time of delivery he dies, it is evident the seller cannot deliver him, but if there remains any part of the thing sold, he is bound to deliver that. But when the thing sold has been lost through the fault of the seller, or after he has been put in default,

⁴⁶ Boynton v. Veazie, 24 Me. 286.

⁴⁷ Rogers v. Van Hoesan, 12 Johns. N. Y. 221.

⁴⁸ Pothier, Obl. n. 241; 1 Duvergier, Dr. Civ. Fr. n. 261.

⁴⁹ Stanton v. Eager, 16 Pick. Mass. 467.

⁵⁰ McCandlish v. Newman, 22 Penn. St. 460.

by not delivering it agreeably to the provisions of the contract, he is responsible in damages.⁵¹ He is equally liable if it perishes in consequence of the acts of some one for whom he is responsible.

If the subject of the sale has been applied to public use by virtue of law, as if my horse Bucephalus, which I sold to you, has been taken by the government to aid in carrying on a war, all you can ask is to be subrogated to my rights, to receive the indemnity paid by the government.

But the thing may subsist, and still I may not be bound to deliver it to you; as, if robbers, without any fault of mine, or those for whom I am responsible, should steal it.⁵² The law will not compel a man to do that which he cannot possibly perform: *Lex non cogit ad impossibilia*.⁵³

952. When the contract of sale is made without fraud, a delivery will vest all the rights of the seller in the buyer, so that the creditors of the former can have no rights whatever to the chattel so sold.⁵⁴ So long as no delivery has taken place, if the seller should sell the chattel twice, to different persons, priority of time prevails, and *qui prior est tempore, potior est jure*; but when a *bona fide* purchaser of a chattel obtains possession, he is preferred to a purchaser prior in date, for *in pari causa possessor potior est*.⁵⁵ He is not to be deprived of the fruits of his care and vigilance in obtaining possession. *Jus civile vigilantibus scriptum est*.⁵⁶

953. In general the motto of *caveat emptor* applies to sales, and the vendee buys at his own risk, unless the vendor gives an express warranty, or the law implies one, or the sale is tainted with fraud.

Where an article is sold by one in possession as his own, there is an implied warranty that his title is good.⁵⁷ This is limited, however, to cases where the vendor is in possession. If the article sold is in possession of a third party, there is no warranty of title.⁵⁸ In an executory contract of sale the vendee is not obliged to receive the article unless the title is good,⁵⁹ and upon total failure of title before delivery of the article he may rescind the sale and recover back the purchase money if he has paid it.

954. In general there is no implied warranty as to the quality of an article where a sale is made of a specific article. A sound price does not imply a sound article, and the vendor does not warrant it to be merchantable or fit for any particular use, though knowing it is purchased for such use.⁶⁰ But where the contract of sale is executory, the article to be sold not being specifically set apart, or not then in being, the vendor warrants the article which he agrees to sell to be merchantable, and fit for the use for which he sells it.⁶¹

There is a warranty of quality, however, where the purchaser has no opportunity of examining the article, as where he orders it from a distance, trusting

⁵¹ Puffendorff, Dr. de la Nat. l. 5, c. 5, § 3; Bowyer, Civ. Law, 208.

⁵² Pothier, Obl. n. 656; Pothier, Vente, n. 60. ⁵³ Coke, Litt. 231, b.

⁵⁴ Dig. 50, 17, 54; Pothier, Vente, n. 321.

⁵⁵ Dig. 50, 17, 128; Pothier, Vente, n. 320.

⁵⁶ Coke, Litt. 290, b, note 1, § 15.

⁵⁷ Whitney v. Heyward, 6 Cush. Mass. 82; Davis v. Smith, 7 Minn. 414; Sherman v. Champlain Co., 31 Vt. 162; Williamson v. Sammons, 34 Ala. n. s. 691; Word v. Cavin, 1 Head, Tenn. 506; Tipton v. Triplett, 1 Metc. Ky. 570; Thompson v. Towle, 32 Me. 87; Robinson v. Rice, 20 Mo. 229; Darst v. Brockaway, 11 Ohio, St. 462.

⁵⁸ Norton v. Hooten, 17 Ind. 365; Huntingdon v. Hall, 36 Me. 501; Long v. Hickingbottom, 28 Miss. 772; Ritchie v. Summers, 3 Yeates, Penn. 531.

⁵⁹ Judson v. Wass, 11 Johns. N. Y. 528.

⁶⁰ Deming v. Foster, 42 N. H. 165; Hadley v. Clinton Co., 13 Ohio, St. 502; Lord v. Grow, 39 Penn. St. 88; Mason v. Chappell, 15 Gratt. Va. 572; Mixer v. Coburn, 11 Metc. Mass. 559.

⁶¹ Overton v. Phelan, 2 Head, Tenn. 445; Cunningham v. Hall, 1 Sprague, Dist. Ct. 404; Fisk v. Tank, 12 Wisc. 276; Brown v. Murphee, 31 Miss. 91; Wright v. Barnes, 14 Conn. 518; Kingsbury v. Taylor, 29 Me. 508; Rodgers v. Niles, 11 Ohio, St. 48.

to the seller.⁶² When provisions are sold for consumption, there is an implied warranty that they are sound.⁶³ But when they are an object of merchandise, there is no such implied warranty.⁶⁴

Upon the sale of goods by sample, there is an implied warranty that the bulk of the commodity is equal in quality to the sample exhibited to the buyer.⁶⁵

955. An *express warranty* is one by which the warrantor expressly covenants or undertakes to ensure that the thing sold is or is not as therein mentioned; as, that a horse is sound, that he is not five years old, and the like.

A general agent who is authorized to do all acts connected with the sale can bind his principal by a warranty, although given in violation of his instructions.⁶⁶ But a special agent, merely authorized to do particular things, cannot warrant so as to bind his principal against his instructions, unless the purchaser has a right to presume such authority.

Any statement made by the vendor at the time of sale, as to the goods, intended as a warranty, and relied on as such by the vendee, is an express warranty.⁶⁷ A mere statement of opinion as to the quality of the goods sold, if made *bona fide*, is not a warranty.⁶⁸

956. After the sale, and before the delivery of the goods, the vendor has still a qualified right of possession. If the goods are sold without any stipulation as to credit, or the sale is expressly for cash, the vendor has, by the common law, a *lien* for the price and proper charges, and need not deliver the goods until they are paid for.⁶⁹ This lien is entirely dependent on the possession of the goods, and does not arise from any kind of property remaining in the vendor; it is lost, therefore, if the vendor loses the possession of the goods.⁷⁰ The lien exists as long as the goods remain actually in possession of the vendor or his agent. If the goods are marked and set apart, this may be a sufficient delivery to pass the title, but will not defeat the vendor's lien.⁷¹

The lien is lost when the vendor surrenders the possession to the vendee, and this surrender, like a delivery, may be symbolical, as by delivering the key of a warehouse or otherwise.

957. No lien exists after the vendee has paid or tendered the price, for there is then no debt. So if the vendee has accepted a note or bill in payment, or has given credit for a certain time, there is no lien, for he cannot have a present lien for a future debt.⁷² But the lien revives if he retains the goods until the maturity of the note, or the expiration of the credit, and the debt is not then paid.

So if the vendee becomes insolvent before the expiration of the credit, the vendor has a lien against his assignee. The waiver of lien which arises from the giving of credit is on condition that the vendee keep his credit good.⁷³

⁶² Howard v. Hoey, 23 Wend. N. Y. 350.

⁶³ 3 Blackstone, Comm. 166; Von Bracklin v. Fonda, 12 Johns. N. Y. 468; Osgood v. Lewis, 2 Harr. & G. Md. 495; Winsor v. Lombard, 18 Pick. Mass. 57.

⁶⁴ Emerson v. Brigham, 10 Mass. 197; Moses v. Mead, 1 Den. N. Y. 378.

⁶⁵ Brantley v. Thomas, 22 Tex. 270; Magee v. Billingsley, 3 Ala. n. s. 679; Waring v. Mason, 18 Wend. N. Y. 425; Willings v. Consequa, 1 Pet. C. C. 301; The Monte Allegre, 9 Wheat. 616.

⁶⁶ Le Roy v. Beard, 8 How. 451; Peters v. Farnsworth, 15 Vt. 155; Bradford v. Bush, 10 Ala. n. s. 386.

⁶⁷ Ender v. Scott, 11 Ill. 35; Henshaw v. Robins, 9 Metc. Mass. 88; Hillman v. Wilcox, 30 Me. 170; Beals v. Olmstead, 24 Vt. 114.

⁶⁸ Hazard v. Irwin, 18 Pick. Mass. 95; Bryant v. Crosby, 40 Me. 18; Whitney v. Sutton, 10 Wend. N. Y. 411.

⁶⁹ Bowen v. Burk, 13 Penn. St. 146; Bank of Columbia v. Hagner, 1 Pet. 455.

⁷⁰ Welsh v. Bell, 32 Penn. St. 12; Lupin v. Marie, 6 Wend. N. Y. 77; Parks v. Hall, 2 Pick. Mass. 212.

⁷¹ Arnold v. Delano, 4 Cush. Mass. 33.

⁷² Cartland v. Morrison, 32 Me. 190; Hall v. Robinson, 2 N. Y. 293.

⁷³ Arnold v. Delano, 4 Cush. Mass. 33; M'Ewan v. Smith, 2 Hou. L. Cas. 309.

958. One of the natural consequences of a sale is, that the buyer shall pay the seller for all expenses he may have sustained in keeping the thing after the completion of the sale; as, if I sell you my horse to be delivered to you on the first day of January, and also a lot of merchandise, and you do not call for them at the time and place agreed upon, in consequence of which I am put to expense in feeding the horse or storing the goods, you are bound to indemnify me.

959. When a person has sold goods to another, and delivered them to a common carrier or middleman, for the purpose of being carried to the purchaser, and while they are thus in their transit the buyer fails, the seller has a right to stop them, retake possession, and prevent the delivery until he has been paid.⁷⁴

The delivery to the carrier, as we have seen, vests the property in the vendee, and the vendor loses the possession of the goods. The right of stoppage *in transitu* therefore depends neither on the right of property nor the right of possession. It is not a lien, but it would seem to be an extension of the vendor's lien, the delivery to the carrier being conditional and the lien revived if the vendee becomes insolvent and the vendor retakes possession.⁷⁵

960. The right of stopping goods *in transitu* is confined to cases in which the consignor is substantially the seller, and does not extend to a mere surety for the price, nor to any person who does not rest his claim on a proprietor's right.⁷⁶

The goods may be stopped by any agent of the vendor, although without special authority, and the vendor may ratify it. So a mere volunteer may assume to act as agent, and the vendor may ratify his authority provided he does so before the *transitus* is ended. And a vendee who finds himself insolvent may notify the vendor and leave the goods in the carrier's hands. This is a good stoppage *in transitu*.⁷⁷

961. To allow the right of stoppage *in transitu* to be exercised, the goods must be unpaid for. But a partial payment only reduces the debt *pro tanto*, and the vendor may stop the whole until the balance is paid. And the goods may be stopped where a bill or note has been taken in payment, or credit has been given,⁷⁸ if the bill or note remains in the hands of the vendor unpaid and has not been transferred to a third party for value.

962. The right of stoppage *in transitu* must be exercised *during the transit*, and while something remains to be done to complete the delivery; for the actual or symbolical delivery of the goods to the buyer puts an end to the rights of the seller to stop the goods *in transitu*.⁷⁹ But if, before he parts with the goods, the seller annexes a condition that security shall be given before taking possession; or that the price shall be paid in ready money; or that a bill shall be delivered; the property does not pass by the mere act of the buyer's obtaining the possession.

When the seller has given the buyer documents sufficient to transfer the property, and the buyer, upon the strength of such documents, has sold the goods

⁷⁴ See generally Bacon, Abr. *Merchant* (L); Ross, Vend.; 2 Selwyn, Nisi P. 1206; Whitaker, Stopp. in Trans.; 3 Chitty, Comm. Law, 340; 2 Leigh, N. P. 1472.

⁷⁵ Grout v. Hill, 4 Gray, Mass. 366.

⁷⁶ Siffken v. Wray, 6 East, 371; 1 Bell, Comm. 224.

⁷⁷ Grout v. Hill, 4 Gray, Mass. 367; Cox v. Burns, 1 Iowa, 64.

⁷⁸ Stubbs v. Lund, 7 Mass. 453; Donath v. Bromhead, 7 Penn. St. 301.

⁷⁹ Covell v. Hitchcock, 20 Wend. N. Y. 167, 23 Wend. N. Y. 611; Ellis v. Hunt, 8 Term, 464. See Allen v. Mercier, 1 Ashm. Penn. 103.

to a *bona fide* purchaser without notice, the seller is divested of his rights;⁸⁰ but a simple release by the buyer does not of itself, and without other circumstances, destroy the vendor's right of stoppage *in transitu*.⁸¹

The moment the *transitus* is at an end, the right of stoppage ceases; but what shall be so considered depends upon circumstances too minute to be detailed here.⁸²

963. The vendor may stop the goods by taking actual possession of them either himself or by an agent. But this is not necessary; it is enough if he claim them of the carrier and endeavor to get possession of them. A notice to the carrier not to deliver the goods to the vendee is sufficient, and the carrier is liable in trover if he delivers them after such notice.

964. To entitle the seller to stop the goods, the buyer must have actually failed, or be in actual and immediate danger of insolvency, and the validity of the seller's right depends entirely upon this. Technical insolvency or bankruptcy is not essential; it is enough that there is a present inability to pay in the ordinary course of business.⁸³ The insolvency, however, must happen or first become known to the vendor after the sale. If the vendee's insolvency exists, and is known to the vendor at the time of sale, the right is waived, but the fact of insolvency without knowledge has no such effect.⁸⁴

965. Stopping goods *in transitu* does not of itself rescind the contract, but merely replaces the parties in the same position as if the vendor had not parted with the possession.⁸⁵ The vendor has therefore a lien for the price, and may retain them until he is paid, and while retaining them may bring his action for the price.⁸⁶ Or if the vendee, after notice and reasonable delay, refuses to pay, he may resell the goods, and apply the proceeds to the payment of the price, and if insufficient may recover the balance of the first vendee.⁸⁷

966. The buyer of chattels is bound to pay the price of the goods, and if no price is agreed on, to pay their market value. He is bound to take them away within a reasonable time, failing to do which he is liable to the seller for storage, or even for damages; but neglect to remove them will not of itself entitle the seller to rescind the contract. If the goods are not such as contracted for, the buyer may rescind the sale; but he must do this within a reasonable time. But if the contract is wholly executed, the goods delivered and paid for, he cannot return them except in case of fraud, but must sue for breach of warranty.⁸⁸

967. The development of the rules which determine the obligations of the seller necessarily explains the rights of the buyer; and reciprocally to show in what the obligations of the buyer consist is to point out the rights of the seller; thus, when the law makes the principal obligation of the buyer to pay

⁸⁰ *Walter v. Ross*, 2 Wash. C. C. 283; *Stubbs v. Lund*, 7 Mass. 453; *De Wolf v. Harris*, 4 Mas. C. C. 515; *Lee v. Kimball*, 45 Me. 172.

⁸¹ *Craven v. Ryder*, 6 Taunt. 433; *Stoveld v. Hughes*, 14 East, 308.

⁸² See the following cases: *Barrett v. Goddard*, 3 Mas. C. C. 107; *Harman v. Anderson*, 2 Campb. 243; *Covell v. Hitchcock*, 20 Wend. N. Y. 167, 23 Wend. N. Y. 611; *Stubbs v. Lund*, 7 Mass. 453; *Bolin v. Huffnagle*, 1 Rawle, Penn. 9; *Bell v. Moss*, 5 Whart. Penn. 189; *Hurry v. Mangles*, 1 Campb. 452; *Ellis v. Hunt*, 3 Term, 464; *Naylor v. Dennie*, 8 Pick. Mass. 198.

⁸³ *Lee v. Kilburn*, 3 Gray, Mass. 594; *Secomb v. Nutt*, 14 B. Monr. Ky. 324; *Hays v. Mouille*, 14 Penn. St. 51.

⁸⁴ *Reynolds v. Boston R. R.*, 43 N. H. 580; *Benedict v. Schaettle*, 12 Ohio, St. 515.

⁸⁵ *Chandler v. Fulton*, 10 Tex. 2; *Rogers v. Thomas*, 20 Conn. 53; *Stanton v. Eager*, 16 Pick. Mass. 475.

⁸⁶ *Rowley v. Bigelow*, 12 Pick. Mass. 313.

⁸⁷ *Newhall v. Vargas*, 15 Me. 314.

⁸⁸ *Thornton v. Wynn*, 12 Wheat. 193; *Lyon v. Bertram*, 20 How. 149; *Mayer v. Dwinell*, 29 Vt. 208. *Contra*, *Dorr v. Fisher*, 1 Cush. Mass. 271; *Franklin v. Long*, 7 Gill & J. Md. 407.

the price, it gives the seller the right to enforce the payment. These rights of the buyer are correlative to the obligations of the seller, which have already been considered.

968. Sales are of various kinds: when considered as to their effect, they are absolute or conditional; when as to the will of the parties, they are voluntary or forced; when as to the mode of making them, they are public or private.

969. An *absolute* sale is one made and completed, without any condition whatever, by which the property with all its incidents is conveyed by the seller to the buyer, for exactly the same rights the former had in it, and with the guaranties implied by law.

970. A *conditional* sale is one which depends for its validity upon the fulfillment of some condition. These conditions are resolutory or suspensive.⁸⁰ We will here confine our inquiries to sales made upon a suspensive condition.

A common example of a conditional sale is when goods are sold "to arrive" by a ship, or on "sale and return," that is, the vendee is to return all that he does not sell. So goods may be sold on trial; the vendee is then to try them, and to return them, if unsuitable, within a reasonable time.

Where a sale is made on condition the condition must be strictly and fully performed. If goods are sold on condition they are made at a certain time, their manufacture is a condition precedent. Where goods are sold "to arrive," the arrival intended is usually that of the goods in the ship in the ordinary course of navigation, and the condition is not satisfied if the ship arrives without the goods, or the goods are transhipped from the wreck of the ship.⁸¹

971. Goods and merchandise which are susceptible of being counted, weighed or measured, may still be sold in gross or in a body without requiring any ascertainment of their number, weight, or quantity, as a sale of a heap of grain or a flock of sheep. In these cases the sale has the same effect as if there were but one single article, as a bushel of grain or one single sheep. There being nothing further to be done by the seller, the sale is perfect, and the goods are at the risk of the buyer. But still, as regards third persons, the sale will not have all its effects until the delivery of the goods.⁸¹

A sale thus made of the whole of a commodity in gross differs essentially from one made of only a part of it. In the latter case the goods are at the risk of the seller until after the counting, weighing, or measuring.⁸²

972. When the article sold is one which may be tasted, the sale may be on the condition that it shall please the taste of the purchaser, and until he has approved of it, after tasting, the sale is incomplete, but when approved, the buyer cannot afterward decline.

973. In general, a sale of articles on trial is presumed to be made under a suspensive condition. But there are two species of trial.

A writes to B, a manufacturer, to send him a piece of cloth, and adds, if it pleases me I will pay you so much for it; the sale does not take place until A has approved of it. If, however, he should for a long time delay upon deciding it, it will be presumed he approved of it.⁸³

But if A buys a horse upon condition that if after the trial he do not approve of him, the sale shall be null; this is a resolutory condition.

974. A *voluntary* sale is one made without constraint, freely, by the owner of the thing sold. A man having an absolute right over his property may of

⁸⁰ See before, 754.

⁸¹ *Siffkin v. Boyd*, 2 Campb. 327; *Idle v. Thornton*, 3 Campb. 274.

⁸² *Shumway v. Rutter*, 7 Pick. Mass. 56; 8 Pick. Mass. 443.

⁸³ *Davis v. Hill*, 3 N. H. 382; *Andrew v. Deitrick*, 14 Wend. N. Y. 31; *Young v. Austin*, 6 Pick. Mass. 280.

⁸⁴ *Humphries v. Carvalho*, 16 East, 45.

course dispose of it as he pleases, and sell it at any price he thinks proper. To sales thus voluntarily made the usual rules relating to this subject apply.

975. A *forced sale* is one made without the consent of the owner of the property by some officer appointed by law, as by a marshal or sheriff, in obedience to the mandate of a competent tribunal. This sale has the effect to transfer all the rights the owner had in the property, but it does not, like a voluntary sale of personal property, guarantee a title to the thing sold;⁹⁴ it merely transfers the rights of the person as whose property it has been sold. This kind of sale is called a *judicial sale*.

976. A *public sale* is one made by auction to the highest bidder, whether the same be forced or voluntary. An *auction* is a sale authorized by law at which property is publicly sold to the highest bidder.

Sales of this kind are called *judicial sales* when made by the marshals of the different districts of the United States, by sheriffs, by constables, and sometimes by other officers who are authorized by law. These sales are not in general subject to all the rules of other sales; for example, there is no warranty of title of personal property, either express or implied.

But public sales are usually made by auctioneers appointed by law, who sell goods not under judicial process, but by the authority of the owner or of persons who have a lawful right to make such sales.

The usual way of conducting an auction sale is to offer the property, and to receive the bids of all proper persons, higher and higher, until no one will offer more. The auctioneer then accepts the last offer, by knocking down a hammer, and the moment this is done both parties are bound by the contract; the owner of the goods to deliver them, the buyer to pay for them. The manner of conducting a sale by auction is immaterial, whether it be by outcry as just described, or in any other way. The essential part is the selection of a buyer from a number of bidders.⁹⁵

The sale is not complete until the bid has been accepted. The bid is only an offer to pay a stipulated price for the article about to be sold; and, like every other offer which has not been accepted, it may be withdrawn until accepted;⁹⁶ indeed it has been holden that it may be withdrawn by implication.⁹⁷

Fairness is required in all cases, both from the auctioneer and the buyer; and the former will be considered as acting for himself, unless at the time of the sale he discloses the name of his principal.⁹⁸ On the part of the buyer, if he has been guilty of any fraud, the sale will be vitiated; as, for example, where a number of bidders associate together with a design to stifle competition.⁹⁹ But there is nothing unlawful in two or more persons agreeing together to purchase a property at sheriff's sale, fixing a certain price which they are willing to give, and appointing one of their number to be the bidder.¹⁰⁰ If the owner, on his part, employs a person to bid for the purpose of running up the property to an unreasonable price, this will also vitiate the sale.¹⁰¹ The owner, however, has a right to limit the lowest amount at which the property shall be sold.¹⁰²

977. A *private sale* is one made voluntarily, and not at auction.

⁹⁴ The Monte Allegre, 9 Wheat. 616; Yates v. Bond, 2 McCord, So. C. 382; Bashore v. Whistler, 3 Watts, Penn. 490.

⁹⁵ Hebler v. Hodge, 1 Watts & S. Penn. 552.

⁹⁶ Sugden, Vend. 29; Babington, Auct. 30, 42.

⁹⁷ Donaldson v. Kerr, 6 Penn. St. 486.

⁹⁸ Mills v. Hunt, 20 Wend. N. Y. 431.

⁹⁹ Smith v. Greenlee, 2 Dev. No. C. 126.

¹⁰⁰ Smull v. Jones, 6 Watts & S. Penn. 122.

¹⁰¹ Moncrief v. Goldsborough, 4 Harr. & M'H. Md. 482.

¹⁰² Wolfe v. Lingster, 1 Hall, N. Y. 146; Hazull v. Dunham, 1 Hall, N. Y. 655; Steele v. Ellmaker, 11 Serg. & R. Penn. 86.

CHAPTER VIII.

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- 1055-1060. Requisites.—Parties.
 - 1056. Property, what may be deposited.
 - 1057. Delivery.
 - 1059. Contract must be gratuitous.
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- 1068-1076. Mandates.
 - 1069. Subject matter of the contract.
 - 1070. Contract must be gratuitous.
 - 1071. Consent of parties.
 - 1073. Obligations and rights of mandatary.
 - 1074. Obligations of mandator.
 - 1075. Dissolution of contract.
- 1077-1125. Bailments for the benefit of the bailee.
- 1078-1088. Loan for use, or *commodatum*.
 - 1080. The thing lent.
 - 1081. The loan must be gratuitous.
 - 1082. Rights of borrower.
- 1083-1087. Obligations of borrower.
 - 1084. Degree of care.
 - 1085. Use of thing.
 - 1086. Obligation to return.
 - 1087. To return in good condition.
 - 1088. Dissolution of contract.
- 1089-1099. Loan for consumption, or *mutuum*.
 - 1091. Essence of the contract.
 - 1097. Parties.
 - 1099. Obligations of borrower.
- 1100-1124. Loan on interest and usury.
- 1101-1115. Interest.
 - 1102. Who are bound to pay interest.
 - 1104. To whom interest is allowed.
 - 1106. On what claims interest is allowed.
- 1109-1115. Amount of interest.—Time.
 - 1111. Simple interest.
 - 1112. Compound interest.
 - 1113. Foreign interest.
 - 1114. Interest, how computed.
 - 1115. Interest, when barred.
- 1116-1124. Usury.
 - 1117. The loan.
 - 1121. Agreement to return principal.
 - 1122. Agreement to pay usury.
 - 1123. The intention to violate the law.

1124. Effect of usurious contract.

1125. *Promutuum*.

978. Numerous contracts, having some general resemblance to a sale, are known by the generic name of bailments. Various definitions have been given of the word bailment. The clearest is that of Merlin, adopted by Story.¹ A *bailment* is a delivery of a thing in trust for some special purpose, and upon a contract, express or implied, to conform to the object or purpose of the trust.

Bailments are divisible into three classes: those in which the trust is for the benefit of both parties, as hiring and letting to hire, and pawns or pledges; those in which the trust is for the benefit of the bailor, as deposits and mandates; those in which the trust is for the benefit of the bailee, as gratuitous loans for use, etc.

979. The first class will be divided into two divisions: in the first will be examined the rules which relate to hiring and letting to hire; and in the second, those which apply to pawns or pledges.

980. *Hire* is an agreement by which one of two contracting parties binds himself to let the other have and use a thing, or his work or labor, for a time agreed upon, in consideration of a certain price which the other binds himself to pay to him. He who agrees to let the other enjoy the use of the thing is called the letter, locator; the other the hirer, conductor.

This contract arises from the principles of natural law; it is voluntary, and founded in consent; it involves mutual and reciprocal obligations; and it is for mutual benefit.

981. In many respects it bears a strong resemblance to the contract of sale; and indeed it may be said that hiring is nothing else than the sale of the use and benefit of the thing, or of the labor, which forms the subject of the agreement; the principal difference between them is, that in cases of sales, the owner parts with the whole proprietary interest in the thing; and in cases of hire, the owner parts with it only for a temporary use and purpose. In a sale, the thing itself is the object of the contract; in hiring, the use of the thing is the object.²

982. There is a kind of contract which, strictly speaking, is not hiring, and yet it partakes of its nature. It frequently takes place among poor people in the country; the following is an example: Two poor neighbors, each owning a horse, are desirous to plough their respective fields, to do which two horses are required; one agrees that he will let the other have his horse for a particular time, on condition that the latter will let the former have his horse for the same length of time.³ This contract is not properly a hiring, for want of a price, which, according to the civilians, is required in this contract; nor is it a loan for use, because there is to be a recompense or consideration; it has been supposed to be a partnership, but it differs from that contract, because there is no community of profits. This contract is generally ruled by the same principles which govern the contract of hiring.⁴

983. The contract of hiring and letting is usually divided into two kinds: *locatio*, or *locatio conductio rei*, the bailment of a thing to be used by the hirer for a compensation to be paid by him; *locatio operis*, or the hire of the labor and services of the workman or undertaker, and to be paid by the employer.

984. To form the contract of *locatio conductio rei* there must be, a thing to be let; a price; a letter, or party to let; a hirer, or a party to hire.

¹ Merlin, Répert, Bail; Story, Bailm. c. 1, § 2. See Jones, Bailm. 1, 117; 2 Sharswood, Blackst. Comm. 395, 451; Kent, Comm. Lect. 40, p. 437.

² Pothier, Louage, n. 2, 3 & 4; Vinnius, lib. 3, t. 25, in pr.; Jones, Bailm. 86; Story, Bailm. § 371; Bowyer, Civ. Law, 211; Inst. 3, 25, prin.; Dig. 6, 1, 9; Erskine, Inst. 3, 3, 14; 1 Bell, Comm. 451.

³ Pothier, Louage, n. 458.

⁴ Duvergier, Dr. Civ. Fr. tom. 8, n. 247.

985. The contract of hiring cannot exist unless there be a *thing* the use of which is conveyed by the letter to the hirer, for a time agreed upon between them. It is then essential to the contract of hiring, that there be a thing; that it be susceptible of the contract of hiring; that there be an enjoyment or use of the thing which is the object of the contract; that there be a time during which the enjoyment is to last.

986. If the thing agreed upon should perish, it is clear there would be no hiring; as, if I hire a certain horse from you, and the horse dies before the time when the hire commenced, there is no contract. But if the horse be indeterminate, and a horse you had selected dies, you are bound to furnish me another; and, if the latter be fit for my service, I am bound to take him.

987. In general, all sorts of things may be hired. But there are things which are susceptible of sale, which cannot be hired; such as are consumed by use, as money, wheat, cider, etc. The reason is evident: by this contract the hirer is bound only to use the thing which he must return; but a man who passes money, who eats the wheat, and drinks the cider, cannot return them.⁵ Things of this kind, which are consumed by use, are called *fungibles*.

988. What *enjoyment* the hirer of a thing is to have in the thing hired depends on the contracting parties; by consent it may be applied to any purpose which does not entirely destroy it; but when the parties are silent on the subject, then the question arises, how the hirer is to use it. It is not always easy to answer the question. As a general rule, it is presumed to have been hired for the use for which it is destined by its nature, and sometimes also for that which the profession of the hirer, or other circumstances, point out as being the intention of the parties; for example, if a saddle horse be hired for one week, the hirer could not use him to draw heavy draughts in wagons or to turn a mill, such evidently not being the intention of the parties; or if a riding carriage were hired for a week, it could not be used to carry manure as a dung-cart.⁶

The use to which the thing is to be put must be lawful, whatever may be the agreement. If an express contract were made by which the letter would hire a horse to enable the hirer to commit a larceny, or if a hire of clothes were made to a woman for the purpose of prostitution, the contract would be void.⁷

If the unlawful use was not mentioned in the agreement, neither of the parties could prove that the contract was unlawful in order to avoid its performance; if the contract was in writing, it could not be changed nor altered by parol proof; and if it was merely oral, the delinquent party could not be heard to allege his own turpitude: *Nemo auditur turpitudinem suam allegans*.

989. In general, the *time* during which the hiring is to continue is made a part of the contract, but sometimes this is left uncertain; in these cases the intention of the parties may be collected from circumstances; if, for example, a pair of horses and a carriage are hired to you at a certain price per day, and the contract mentions that you hire them to make a journey from Philadelphia to Richmond, it cannot be doubted but you will be entitled to them for the whole journey.

990. There can be no contract of hiring without a *price* or consideration, for if there be none the contract will be a loan. It is not indispensable that the agreement as to the price should be expressed, it will be sufficient when implied, and then the customary price must be paid, or if there be no customary price, then a reasonable price. Whether the consideration be a price paid in

⁵ Hurd v. West, 7 Cow. N. Y. 752.

⁶ Wheelock v. Wheelwright, 5 Mass. 104; Schenck v. Strong, 1 South. N. J. 87; Homer v. Thwing, 3 Pick. Mass. 492; Rotch v. Hawes, 12 Pick. Mass. 136.

⁷ Sheppard, Touchst. 163; Coke, Litt. 206, b.

money, or a recompense in something else, it is still a hiring, and both cases are considered as bailments for hire.⁸

991. The letter must be competent to make a contract, for one not *sui juris*, or incompetent to make an agreement, cannot let a thing to hire. The obligations of the letter and the rights of the hirer are correlative terms, the obligations of the one are the rights of the other. Again, the obligations of the hirer are the rights of the letter. Under this head will be considered only the obligations of the letter.

The letter impliedly warrants his own title and right of possession, and is bound to do all in his power necessary to secure to the hirer the right of possession during the term. Thus he is bound to deliver the thing hired, and to refrain from every obstruction to the use of it by the hirer during the bailment.

He engages that the thing is suitable for the use for which it is hired,⁹ and may under the contract be bound to keep it suitable for such use during the bailment.

992. In considering the obligations of the letter, we have incidentally mentioned the rights of the *hirer*, the principal of which are the following:

He acquires a special property in the thing hired during the continuance of the contract, and may recover damages for a wrongful taking of it, even against the owner.¹⁰

He acquires the exclusive right to the use of the thing during the time of the bailment,¹¹ and if he misuses it, this does not authorize the letter to take it by force,¹² but such act puts an end to his special property, and the thing may be recovered in trover.¹³

993. Among the obligations of the hirer the following are the principal:

He is bound to use ordinary diligence in the care of the thing, such diligence as a man of ordinary prudence would use in regard to his own property.¹⁴ He is not liable for damage caused by inevitable accident without his fault,¹⁵ unless by special agreement.¹⁶ He is liable for damage caused by the negligence of his agents and employés.¹⁷ But where the property is under the management and control of the agents of the letter, the hirer is not responsible for their acts; as where one lets a carriage, sending a driver with it.¹⁸

What constitutes negligence will depend on the particular circumstances of each case.

He is not liable for thefts unless they occur from want of reasonable care on his part.¹⁹ In general the burden of proof is on the letter to show a want of reasonable care.²⁰

He is not only bound to take good care of the thing, but he must use it for

⁸ Mr. Justice Story is of opinion that the consideration may be paid in money or other thing. Story, Bailm. § 377; while Mr. Chancellor Kent, who has followed the civilians, describes hiring as a pecuniary bailment. 2 Kent, Comm. 385.

⁹ Swigert v. Graham, 7 B. Monr. Ky. 661; Sims v. Chance, 7 Tex. 561.

¹⁰ Hickok v. Buck, 22 Vt. 149.

¹¹ Roberts v. Wyatt, 2 Taunt. 268.

¹² Hartford v. Jackson, 11 N. H. 145; Lee v. Atkinson, Yelv. 172.

¹³ 2 Saund. 47, f.; Clarke v. Poozer, 2 McMull. So. C. 434; Morse v. Crawford, 17 Vt. 499; Setzar v. Butler, 5 Ired. No. C. 212.

¹⁴ Mayor of Columbus v. Howard, 6 Ga. 213; Millon v. Salisbury, 13 Johns. N. Y. 211; Brown v. Waterman, 10 Cush. Mass. 117.

¹⁵ McEvers v. Steamboat Sangamon, 22 Mo. 187.

¹⁶ Vaughan v. Webster, 5 Harr. Del. 256.

¹⁷ Sinclair v. Pearson, 7 N. H. 219; Philadelphia R. R. Co. v. Derby, 14 How. 468.

¹⁸ Hughes v. Boyer, 9 Watts, Penn. 556.

¹⁹ Brown v. Waterman, 10 Cush. Mass. 117.

²⁰ Schmidt v. Blood, 9 Wend. N. Y. 268; Harrington v. Snyder, 3 Barb. N. Y. 380; Logan v. Matthews, 6 Penn. St. 417; Rugnan v. Caldwell, 7 Humphr. Tenn. 134.

no other purpose than that for which it is hired.²¹ If he applies it to any other use, it amounts to a conversion of the property, and the letter may recover it in trover, or recover the damages caused by such misuser.²²

The hirer is bound to restore the thing hired, when the bailment is determined. The time, place, and the mode of its restitution, are governed by the circumstances of each case, and depend upon the rules of presumption of the intention of the parties, as in other cases of bailment, unless there has been an express agreement on the subject.²³

The hirer is excused from returning the thing, if it is lost without any negligence on his part. He may by his own fault disable himself from returning it: in this case the only remedy of the letter is in damages for breach of the contract; for example, where he sells the property, or annexes hired personal property to real estate, and sells the whole.²⁴

There is also an implied obligation, when there has been no express contract, that the hirer will pay the hire or recompense.

994. *Hiring of labor* is a contract by which one of the contracting parties, called the employer, gives to the other, called the workman or undertaker, a certain work to be performed, which the latter promises to perform, for a price or recompense which the former binds himself to pay. Under this head we shall consider separately: hire of labor; hire of custody.

995. The contract of hire of labor differs mainly from the contract of the hire of things, in this, that the hire of a thing is given for a certain price or recompense, paid to the letter, which is the object of the letter, and the work given to be done forms the substance of the former. In the contract for the hire of a thing the hirer agrees to pay the price or hire, and in hiring of labor or services, the employer binds himself to pay the price or hire.

There is a considerable resemblance between this contract of hiring of labor and a sale; if I order a carriage to be made, and the materials are to be furnished by the coachmaker, there is a contract of sale: so, if I order a tailor to make me a coat, and he is to furnish the materials, it is a sale; but if I furnish the cloth to a tailor to make me a coat, and he merely puts his work upon it, it is a contract of hire of labor. This would be the case also were the tailor to furnish the buttons, twist, etc., commonly called the trimmings.²⁵

996. As in the contract for the hire of a thing, so in this contract, there are three requisites, namely: a work to be performed; a price or recompense; the consent of the parties.

997. *The work to be done* must be such as can be performed, for if the contract were to do an impossible thing it would be void. The thing to be done must be lawful; for example, if you employed a painter to paint a libel, or a printer to print an obscene work, the contract would be void.

998. It is evident there must be a *price* or recompense, or the contract would no longer be a hiring for labor, but a mandate. But still it is not requisite that the parties should have expressly agreed upon a price; one may be implied. If I send cloth to a tailor with a request that he make me a coat, the law presumes that I will pay him what he justly deserves, a *quantum meruit*.

²¹ Mullen v. Ensley, 8 Humphr. Tenn. 428; McLaughlin v. Lomas, 3 Strobb. So. C. 85.

²² Rotch v. Hawes, 12 Pick. Mass. 136; Sargent v. Gile, 8 N. H. 325; Woodman v. Hubbard, 25 N. H. 67.

²³ Story, Bailm. § 415.

²⁴ Morse v. Crawford, 17 Vt. 499; Sargent v. Gile, 8 N. H. 325; Fryatt v. Sullivan Co., 7 Hill, N. Y. 529.

²⁵ Pothier, Louage, n. 394; Story, Bailm. § 423; Mallory v. Willis, 4 N. Y. 76; Cox v. Reynolds, 7 Ind. 257; Brown v. Hitchcock, 28 Vt. 452; King v. Humphreys, 10 Penn. St. 217.

999. As in all other contracts, there must be a consent between the parties.

1000. *The obligations of the employer, which arise from the nature of the contract, are the following:*

To pay the price agreed upon, or if no price has been fixed, to pay the workman what his work is worth, or what he deserves.

If there have been any deviations made in the plan, with the express or implied consent of the employer, to pay for the additions what the workman deserves. The rule in cases of deviation is to trace the work according to the original plan, and the additions are to be paid according to the usual rate of such work.²⁶

The employer is bound to do all he can to enable the workman to fulfil his contract. If you employ a plumber to introduce the Croton water into your house in the city of New York, you are bound to pay whatever expense may be charged to obtain a permit from the proper authority.

The employer is bound to receive the thing when finished.

In making the contract, the employer must use no means to deceive the workman; such deceit may amount to a fraud, and vitiate the contract.

1001. *The workman or undertaker is bound: to perform the work he has undertaken to do; to do it in proper time; to do it well; to employ the things furnished him according to his contract.*

1002. The undertaker is bound by his contract to do the work he has promised to perform, but, in general, he may employ workmen to assist him, or to do the whole under his superintendence. Some undertakings must, however, be performed by the party himself, as, if I want a work of art, as a statue or a painting, and I employ a particular statuary or painter to make them, the presumption is that I want no other's work, for the value of the thing depends, in a great degree, on the name and skill of the artist.²⁷

The bailee will, in general, be liable for damages caused by his non-performance of the work entrusted to him.²⁸ But this depends on the entirety of the contract. If it is severable, as if the workman is employed by the day, he may stop at any time, and recover his wages *pro tanto*. But if it is entire, then the completion of the whole is a condition precedent to a recovery of the price.

1003. It is evident that if the work is not done in time, the undertaker will be liable in damages.

1004. As a general rule, he who undertakes for a reward to perform any work is bound to use a degree of diligence, attention, and skill adequate to the performance of his undertaking, that is, to do it according to the rules of the art: *spondet peritiam artis*.²⁹ It is his fault to undertake to do a thing beyond his strength, or for which he has not sufficient skill, or to employ bad workmen; in this case the maxim applies, *imperitia culpæ annumeratur*;³⁰ ignorance is like negligence, for which one is responsible. If, for example, a farrier undertake to cure a horse, he is required to use reasonable skill; if a carpenter undertake to build a ship, he engages to use the skill suited to the character of the undertaking. And the degree of skill arises in proportion to the value and delicacy of the operation. But he is in no case required to have more than ordinary skill, for he does not presumably engage for more.

1005. Under this rule all professional men, who can recover for their services in an action, are included; their contract is *locatio operarum*, and not

²⁶ *Craven v. Tickell*, 1 Ves. Ch. 60; 13 Ves. Ch. 73, 81.

²⁷ *Pothier, Louage*, n. 421. See *Rust v. Larue*, 4 Litt. Ky. 416.

²⁸ *Morgan v. Congdon*, 4 N. Y. 551; *McIntyre v. Carver*, 2 Watts & S. Penn. 392.

²⁹ *Pothier, Louage*, n. 425; *Jones, Bailm.* 22, 53, 62, 97, 120; *Domat*, B. 1, t. 4, s. 8, n. 1; *Story, Bailm.* § 431; *Coggs v. Bernard*, *Ld. Raym.* 909; 1 Bell, *Comm.* 5th ed. 459.

³⁰ *Dig.* 50, 17, 132.

mandate. An action will, therefore, lie against an attorney,³¹ or a physician,³² for neglect; for, like artists of all kinds, wherever they engage their services for a compensation which they could recover by action, they are responsible for the skill and art necessary to accomplish safely what they undertake, in so far as ordinary skill and art can accomplish it. The public who employ them may exercise a judgment of selection, but having selected the person, they are entitled to presume that he has the ordinary skill in his art of which he holds himself out to the world to be possessed.³³ But if the employer were to engage a common blacksmith to repair his watch, and he should spoil it, or a farrier to cure his eyes, and he should lose his sight by taking his remedies, he would have no legal ground of complaint.³⁴

1006. He is bound to use the materials furnished to him according to his contract and for the advantage of his employer; as, to employ the cloth I sent a tailor to make me a coat so that I can have a coat which shall fit me, for if it be so made that I cannot wear it, this is not a proper employment of the materials. But, if the undertaker use ordinary skill and care, he will not be responsible, although the materials may be injured; as, if a gem be delivered to a jeweler and it is broken without any unskilfulness, negligence, or rashness of the artisan, he will not be liable.³⁵

The workman is to use ordinary diligence in the care of the materials entrusted to him, or to exercise that caution which a prudent man takes of his own affairs,³⁶ and he is also bound to preserve them from any unexpected danger to which they may be exposed.³⁷

1007. Where the object of the bailment perishes before the bailment is completed, the question arises, Who is to bear the loss? If the bailee is in fault, the loss will be his whether he owns the article bailed or not. But the loss may happen by inevitable accident or otherwise without fault of the bailor or bailee.

Where the employer engages a workman to make an article out of the workman's own materials, the employer has no property in it until the work is completed and the article delivered to him. If in the mean time the thing perishes, it is the loss of the workman, who is wholly its owner according to the maxim, *res perit domino*.³⁸

Where the employer furnishes all the materials and the workman furnishes all the labor, the property is in the employer, and the loss of the materials must fall on him. And in such a case in general the workman loses his labor; but this depends on the nature of the contract. If the contract is entire, and the workman is to be paid on the completion of the work, the workman is entitled to nothing if the completion is prevented without the fault of any one. If the contract is divisible, the workman will be entitled to his hire on a *quantum meruit*.³⁹

But the most complicated question arises where the workman adds both labor and materials to the property of the employer already existing. In this case it

³¹ *Dearborn v. Dearborn*, 15 Mass. 316; *Crooker v. Hutchinson*, 2 D. Chipm. Vt. 117; 1 Vt. 73; *Varnum v. Martin*, 15 Pick. Mass. 440; *Ruggles v. Ives*, 6 Mass. 494; *Wilson v. Russ*, 20 Me. 421.

³² *Gallagher v. Thompson*, Wright, Ohio, 466; *Landon v. Humphrey*, 9 Conn. 209.

³³ Bell, Comm. 459, 5th ed.; *Moore v. Morgue*, Cowp. 497.

³⁴ Jones, Bailm. 99, 100.

³⁵ Pothier, Louage, n. 428.

³⁶ *Clarke v. Earnshaw*, 1 Gow, 30.

³⁷ *Leck v. Maestaer*, 1 Campb. 138.

³⁸ *McConihe v. New York R. R. Co.*, 20 N. Y. 495.

³⁹ *Buffum v. Merry*, 3 Mas. C. C. 478; *Foster v. Pettibone*, 17 N. Y. 433.

is generally held that the employer must bear the loss of the old and new materials, and must also pay for the labor furnished.⁴⁰

1008. The *locatio custodia*, or deposit for hire, is a contract by which one of the parties, called the custodian, or *depository*,⁴¹ undertakes for hire to take care of goods belonging to the other party, called the *depositor*, for a particular time and in a way agreed upon.

These depositaries for hire are of two classes: those who are responsible only for want of ordinary diligence; those who, like carriers, are responsible for all losses except those caused by inevitable accident, or the act of God, and those which are the effect of the act of a public enemy.

1009. *Depositaries responsible for want of ordinary care* are, agistors of cattle, warehousemen, forwarding merchants, factors, and wharfingers. The general rules applicable to bailments of *locatio operis faciendi*, which have been already considered, are also applicable to these contracts.

1010. An agistor is one who receives horses or other animals, on his own ground, for hire, to take care of. The agistor is not bound, like the innkeeper, to take all horses offered to him, nor is he liable for any injury done to the animals under his care, unless he has been guilty of negligence.⁴²

An agistor has no lien on the cattle for the pasturage; and the same holds true of a keeper of a livery stable.⁴³

1011. A *warehouseman* is a person who receives goods and merchandise to be stored in his warehouse for hire. If he receives goods, as wheat, which he mixes with his own, merely engaging to restore an equal quantity, this is a sale and not a bailment, for in a contract of deposit it is necessary that there should be an obligation to restore the specific article.⁴⁴ His liability commences from the moment the goods are delivered to him.⁴⁵ It ends as soon as they are delivered to the bailor or his authorized agent. He is liable if, through negligence, he delivers them to the wrong person, or fails to deliver them when demanded, and they are afterward destroyed.⁴⁶ But he is not liable if they are taken from him by authority of law.⁴⁷

A warehouseman is only bound to use ordinary care and diligence, and is responsible only for want of such care.⁴⁸ In general, when an action is brought for injury to goods, the burden of proof is on the plaintiff, to show negligence.⁴⁹ But where an action is brought for non-delivery, the bailee must show that it did not arise from negligence.⁵⁰

A warehouseman has a lien on the goods for his proper charges, and need not deliver the goods until they are paid.⁵¹

1012. A *forwarding merchant* is one who receives and forwards goods, taking upon himself the expenses of transportation, for which he receives a compensation from the owners, but who has no concern in the vessels or wagons by which they are transported, and no interest in the freight. He is not deemed a

⁴⁰ *Menetone v. Athawes*, 1 Taunt. 137.

⁴¹ 1 Bell, Comm. 458.

⁴² *Rey v. Toney*, 24 Mo. 600; *Goodfellow v. Meegan*, 32 Mo. 280.

⁴³ *Miller v. Marston*, 35 Me. 155; *Grinnell v. Cook*, 3 Hill, N. Y. 492.

⁴⁴ *Chase v. Washburn*, 1 Ohio St. 244.

⁴⁵ *De Mott v. Laraway*, 14 Wend. N. Y. 225.

⁴⁶ *Willard v. Bridge*, 4 Barb. N. Y. 361; *Stevens v. Boston & Maine R. R.*, 1 Gray, Mass. 277.

⁴⁷ *Burton v. Wilkinson*, 18 Vt. 186.

⁴⁸ *Hatchett v. Gibson*, 13 Ala. N. S. 587; *Holtzclaw v. Duff*, 27 Mo. 392; *Cowles v. Pointer*, 26 Miss. 253.

⁴⁹ *Schmidt v. Blood*, 9 Wend. N. Y. 268; *Runyan v. Caldwell*, 7 Humphr. Tenn. 134. Contra, *Logan v. Mathews*, 6 Penn. St. 417.

⁵⁰ *Lichtenhein v. Boston & Prov. R. R.*, 11 Cush. Mass. 70.

⁵¹ *Low v. Martin*, 18 Ill. 286; *Bass v. Upton*, 1 Minn. 408; *Hale v. Barrett*, 26 Ill. 195.

common carrier, but a mere warehouseman or agent.⁵² He is only required to use ordinary diligence in sending the property by responsible persons.⁵³

1013. A *factor* is an agent to sell goods and merchandise consigned or delivered to him by, or for, his principal, for a compensation commonly called *factorage* or commission. He is also called a commission merchant or consignee.⁵⁴ Factors and other bailiffs to manage for hire are generally liable only for a reasonable exercise of skill and ordinary diligence; and are not liable for any accidents unless they are occasioned by their negligence.⁵⁵

1014. A *wharfinger* is one who keeps a wharf, and who receives and ships merchandise to and from it, for hire. Like a warehouseman, he is responsible for ordinary neglect, and therefore required to take ordinary care of goods entrusted to him as such. His responsibility begins when he acquires and ends when he ceases to have the custody of the goods in that capacity. When this takes place depends upon *usage*. When goods are delivered on his wharf, and he assumes the custody of them, either by his express or implied agreement, his liability commences; but a mere delivery at his wharf, without his assent, does not render him liable.⁵⁶ The moment he loses the custody, by properly delivering them on board of a vessel, his responsibility ceases.⁵⁷

1015. An *innkeeper* is one who receives into his house all who choose to come, without any previous specific agreement as to terms or time.⁵⁸ He must receive all who come. A lodging-house keeper may select his guests. The first must provide lodging at a reasonable price; the last makes a distinct contract with each guest. The fact that one entertains strangers occasionally, for pay, does not make him an innkeeper.⁵⁹

1016. An innkeeper is responsible for the safe keeping of the property of his guests. To constitute one a guest, he need not be actually stopping at the inn; it is enough if he puts up his horse at the inn, or leaves his property in the charge of the innkeeper, for hire, during a temporary absence.⁶⁰ An innkeeper may have, at the same time, *guests* and *boarders*, to whom he stands in very different relations; for the strict common-law liability of an innkeeper does not belong to the latter relation. In general, a guest is one who retains his character of a traveler and transient sojourner, though he may remain a long time.⁶¹

In general, the innkeeper is liable for all the property of his guest which is placed in his care; and whatever his guests bring into his inn, in the character of travellers, is under his care.⁶² This includes everything which is properly baggage; but, under the general liability for baggage, an innkeeper is not responsible for large sums of money, jewels, silver-plate, or articles of great value not needed for travelling.⁶³

⁵² *Roberts v. Turner*, 12 Johns. N. Y. 232; *Platt v. Hibbard*, 7 Cow. N. Y. 497.

⁵³ *Brown v. Dinison*, 2 Cow. N. Y. 593.

⁵⁴ *Paley*, Ag. 13; 1 *Livermore*, Ag. 68; *Story*, Ag. § 33; *Comyn*, Dig. *Merchant*, B.; 1 *Bell*, Comm. 385.

⁵⁵ *Coggs v. Bernard*, 2 Ld. Raym. 909, 918; *Vere v. Smith*, 1 Ventr. 121.

⁵⁶ *Buckman v. Levi*, 3 Campb. 414; *Gibson v. Inglis*, 4 Campb. 72; *Packard v. Getman*, 6 Cow. N. Y. 757.

⁵⁷ *Corbin v. Downe*, 5 Esp. 41; Dig. 4, 9, 3; *Abbott*, Shipp. 226; *Molloy*, B. 2, c. 2, s. 2.

⁵⁸ *Wintermute v. Clarke*, 5 Sandf. N. Y. 242; *Taylor v. Monnot*, 4 Du. N. Y. 116; *Howth v. Franklin*, 20 Tex. 798.

⁵⁹ *Lyon v. Smith*, 1 Morr. Iowa, 184.

⁶⁰ *McDaniels v. Robinson*, 26 Vt. 316; *Peet v. McGraw*, 25 Wend. N. Y. 653; *Mason v. Thompson*, 9 Pick. Mass. 280; *Hickman v. Thomas*, 16 Ala. N. s. 666.

⁶¹ *Berkshire Woolen Co. v. Procter*, 7 Cush. Mass. 417; *Chamberlain v. Masterson*, 26 Ala. N. s. 371; *Ingalsbee v. Wood*, 36 Barb. N. Y. 452.

⁶² *Berkshire Woolen Co. v. Procter*, 7 Cush. Mass. 417; *McDonald v. Egerton*, 5 Barb. N. Y. 560; *Packard v. Northcraft*, 2 Mete. Ky. 439; *Mateer v. Brown*, 1 Cal. 221.

⁶³ *Pettigrew v. Barnum*, 11 Md. 434; *Giles v. Fauntleroy*, 13 Md. 126.

1017. Innkeepers are an exception to the general rule applicable to depositaries for custody. Their responsibility is nearly similar to that of common carriers, and for the same reason, the protection of the public. They are bound to exert the greatest diligence in regard to the goods and chattels of their guests.⁶⁴ They are responsible for the acts of their servants, as well as the acts of other guests.⁶⁵ If any loss occurs they are *prima facie* liable.⁶⁶

An innkeeper is not liable if the loss occurs by inevitable accident or the act of Providence,⁶⁷ or by the gross carelessness of the guest.⁶⁸

In order to render an innkeeper liable, the property must be placed under his control, and he may insist upon reasonable safeguards, and the guest must bear the loss if he refuses to use such protection as is furnished and assumes entire control of the property himself.⁶⁹ What is reasonable will, of course, vary in each case. Various statutes have been passed limiting the liability for money and articles of value.

1018. The innkeeper is entitled to a just compensation for his care and trouble in attending to his guest and his property, and finding him what he may require. To enable him to recover this, the law has given him various remedies; he has a lien upon all the property of his guest, in the inn and its stables, for all his claim as innkeeper. The lien does not, however, extend to the person of his guest,⁷⁰ though formerly a different rule obtained.⁷¹

1019. It must be remembered that the rules above mentioned are applicable to innkeepers by the common law. In the United States there are regulations, in each state of the Union, in relation to the licensing inns, hotels, and taverns, and, in some of them, the laws limit or change the rights and liabilities of the keepers of them.

1020. A *common carrier of goods* is one who undertakes, for hire or reward, to transport the goods of such as choose to employ him from place to place.⁷² Such are the owners of vessels and steamboats,⁷³ masters of vessels,⁷⁴ railway companies, bargemen,⁷⁵ ferrymen,⁷⁶ proprietors of stage coaches and stage wagons, which ply from place to place,⁷⁷ expressmen,⁷⁸ truckmen, cartmen, porters who carry parcels in the same town from place to place; indeed all persons who make it a business to carry goods for any who may wish to employ them for hire.

The owners of a tug-boat engaged in towing vessels are not common carriers.⁷⁹ Omnibus owners are common carriers.⁸⁰ A forwarding merchant, who

⁶⁴ *Thickstun v. Howard*, 8 Blackf. Ind. 535; *Manning v. Welles*, 9 Humphr. Tenn. 746.

⁶⁵ *Stanton v. Leland*, 4 E. D. Smith, N. Y. 88.

⁶⁶ *Johnson v. Richardson*, 17 Ill. 302.

⁶⁷ *Merritt v. Claghorn*, 23 Vt. 177; *Sibley v. Aldrich*, 33 N. H. 553; *Shaw v. Berry*, 31 Me. 478.

⁶⁸ *Fowler v. Dorlon*, 24 Barb. N. Y. 384; *Profflet v. Hall*, 14 La. Ann. 524; *Purvis v. Coleman*, 21 N. Y. 111.

⁶⁹ *Pope v. Hall*, 14 La. Ann. 324; *Packard v. Northcraft*, 2 Metc. Ky. 439.

⁷⁰ *Sunbold v. Alford*, 1 Horn. & H. Exch. 13.

⁷¹ *Newton v. Trigg*, 1 Show. 269; Bacon, Abr. *Innkeepers*, D.

⁷² *Mershon v. Hobensack*, 2 N. J. 372; *Fuller v. Bradley*, 25 Penn. St. 120.

⁷³ *Swindler v. Hilliard*, 2 Rich. So. C. 286; *The Huntress*, Dav. Dist. Ct. 82.

⁷⁴ *Bennett v. Filyaw*, 1 Fla. 403; *Brown v. Clayton*, 12 Ga. 564.

⁷⁵ *Chicago R. R. Co. v. Thompson*, 19 Ill. 578; *Kimball v. Rutland R. R. Co.*, 26 Vt. 247; *New Jersey R. R. Co. v. Pennsylvania R. R. Co.*, 3 Dutch. N. J. 100.

⁷⁶ *Smith v. Seward*, 3 Penn. St. 342; *Wilsons v. Hamilton*, 4 Ohio, St. 722; *Hall v. Renfro*, 3 Metc. Ky. 51; *Fisher v. Clisbee*, 12 Ill. 344.

⁷⁷ *Beekman v. Shouse*, 5 Rawle, Penn. 179; *Gordon v. Hutchinson*, 1 Watts & S. Penn. 286.

⁷⁸ *Stadhecker v. Combs*, 9 Rich. So. C. 193; *Sherman v. Wells*, 28 Barb. N. Y. 403.

⁷⁹ *Leonard v. Hendrickson*, 18 Penn. St. 40; *Wells v. Steam Nav. Co.*, 2 N. Y. 204; *Steam Nav. Co. v. Dandridge*, 8 Gill & J. Md. 248. This is doubted in *Adams v. New Orleans Steamboat Co.*, 11 La. Ann. 46.

⁸⁰ *Dibble v. Brown*, 12 Ga. 217; *Parmelee v. McNulty*, 19 Ill. 556.

has no interest in the conveyances which carry the goods, is not a common carrier,⁸¹ though he will be if he habitually forwards them by his own conveyances; in such a case his liability as carrier attaches while the goods are in his warehouse to be forwarded.⁸²

To constitute one a common carrier, he must follow the business publicly, undertaking to carry for all who may employ him; if he merely undertakes the carriage in a particular case he is a private carrier.⁸³

The carriage must be for hire, though it is not necessary that any precise sum should be stipulated; the compensation may be in the nature of a *quantum meruit*.⁸⁴

1021. Common carriers of goods are required to fulfil certain obligations arising from the nature of their employment, are liable for certain losses which occur in the course of their agency, and are entitled to certain rights, either under an express or implied agreement; each of these will be separately examined.

1022. A common carrier is obliged to receive and carry all goods in the scope of his business offered to him by the proper person, at the proper time, and upon pre-payment of the freight if required.⁸⁵ He may, in the exercise of a reasonable discretion, charge different rates for different articles, or decline altogether to carry certain articles, as bank-bills or gold-dust.⁸⁶ But he must carry for all without respect of persons.

He must provide proper conveyances, and must proceed to his destination without any avoidable delay,⁸⁷ by the usual route.⁸⁸ He must obey the reasonable directions of the owner as to the manner of carrying and caring for the goods.⁸⁹ He is not obliged to receive goods more than his capacity to carry; but where, as in the case of railroads, carriers are entrusted with franchises and privileges for the public benefit, they must provide reasonable facilities for all ordinary business.⁹⁰

1023. By the common law a common carrier assumes the responsibility of an insurer, and is liable for all losses except such as happen by inevitable accident or public enemies. This responsibility is upon grounds of public policy, and does not arise from the contract.⁹¹ Therefore it makes no difference what amount of diligence the carrier exercises. If it is shown that goods have been delivered to a common carrier and have been lost or injured, the burden of proof is on him to show that the loss or injury arose from causes for which he is not responsible.⁹²

⁸¹ *Platts v. Hibbard*, 7 Cow. N. Y. 497; *Maybin v. So. Car. R. R.*, 8 Rich. So. C. 240.

⁸² *Ladue v. Griffith*, 25 N. Y. 364.

⁸³ *Penneville v. Cullen*, 5 Harr. Del. 238; *Samms v. Stewart*, 20 Ohio, 69; *Sheldon v. Robinson*, 7 N. H. 157.

⁸⁴ *Chouteau v. St. Anthony*, 16 Mo. 216; *Knox v. Rives*, 14 Ala. n. s. 249; *Kirtland v. Montgomery*, 1 Swan, Tenn. 452; *Fay v. New World*, 1 Cal. 348; *Citizens' Bank v. Nantucket Steamboat Co.*, 2 Stor. C. C. 55.

⁸⁵ *McGill v. Rowand*, 3 Penn. St. 451; *Hastings v. Pepper*, 11 Pick. Mass. 41; *Fitch v. Newbury*, 1 Dougl. Mich. 1; *Galena R. R. v. Rae*, 18 Ill. 488.

⁸⁶ *Lamar v. New York Co.*, 16 Ga. 558; *Fay v. New World*, 1 Cal. 348; *Farmers' Bank v. Champlain Co.*, 23 Vt. 186; *Hosea v. McCrory*, 12 Ala. n. s. 349; *Chouteau v. St. Anthony*, 16 Mo. 216.

⁸⁷ *Harris v. Northern R. R. Co.*, 20 N. Y. 232; *Nudd v. Wells*, 11 Wisc. 407; *Michigan R. R. v. Day*, 20 Ill. 375.

⁸⁸ *Powers v. Davenport*, 7 Blackf. Ind. 497; *Phillips v. Brigham*, 26 Ga. 617.

⁸⁹ *Merrick v. Webster*, 3 Mich. 268; *Sager v. Portsmouth R. R.*, 31 Me. 228.

⁹⁰ *Galena R. R. v. Rae*, 18 Ill. 488; *Wibert v. N. Y. & Erie R. R.*, 12 N. Y. 245.

⁹¹ *Thurmant v. Wells*, 18 Barb. N. Y. 500; *McHenry v. R. R. Co.*, 4 Harr. Del. 448; *Central R. Co. v. Hines*, 19 Ga. 203; *Pendall v. Rench*, 4 McLean, C. C. 259; *Penneville v. Cullen*, 5 Harr. Del. 238; *Powell v. Mills*, 30 Miss. 231; *Mershon v. Hobensack*, 2 N. J. 372.

⁹² *Alden v. Pearson*, 3 Gray, Mass. 342; *Hall v. Cheney*, 36 N. H. 26; *Davidson v. Graham*, 2 Ohio St. 131; *McCall v. Brock*, 5 Strobb. So. C. 119; *Emma Johnson*, 1 Sprague, Dist. Ct. 527; *Stokes v. Saltonstall*, 13 Pet. 181.

It is a question often whether a loss happens from one or the other of two concurring causes, for one of which the carrier is not responsible. In such a case the loss is to be attributed to the efficient predominating cause whether it is or is not in operation at the time of the loss. If any negligence of the carrier contributes to the loss, he is liable, though the immediate cause may be an excepted peril; as, if he stows goods on deck without authority and they are washed overboard or jettisoned in a storm.⁹⁵ But although the carrier may have incurred a risk for which he is liable, as, for example, where he carries goods in an unseaworthy vessel, he may clear himself by showing that the loss actually arose from some other cause entirely disconnected with the unseaworthiness.⁹⁶

1024. If the loss occurs by the *act of God*, the carrier is not responsible.⁹⁷ By this is meant an inevitable accident caused by some irresistible physical cause without the intervention of man; such as lightning and earthquakes. But the loss must be directly caused by the act of God, for the carrier will be liable if the intervention of man or his own negligence is the immediate cause of loss or contributes to make the act of God operative.⁹⁸ The carrier is responsible for losses by accidental fires without fault on his part.⁹⁹

The carrier is also excused if a loss arises from the act of public enemies, that is, those with whom the United States are at open war and not merely robbers, thieves or other private depredators. Pirates are the enemies of all nations, and the carrier is not responsible for losses caused by them.

1025. When the carriage is by water the bill of lading generally contains a proviso that the carrier shall not be liable for "perils of the sea." The exact import of this expression is not clearly settled. In a strict sense it signifies the natural accidents peculiar to the sea; but it has been held to extend to events not attributable to natural causes, as, for instance, capture by pirates, losses by collision where there is no blame, explosion of a steamboat boiler.

It does not include embezzlement,¹⁰⁰ or damage from worms.¹⁰¹

If this phrase is used in inland navigation, it includes perils of the rivers and canals, though "perils of the rivers" is usually substituted.¹⁰²

1026. If the loss arises from the act of the owner, as where he does not put the goods in a fit condition for the journey, it falls on him.¹⁰³

So where the loss arises from inherent defects in the goods, whether known to the owner or not, and the carrier has used proper care.¹⁰⁴ This has been held to include damage by horses to each other from viciousness.¹⁰⁵

Where the goods are such as require peculiar care it is the duty of the owner to make this fact known to the carrier,¹⁰⁶ unless it is apparent from the outside.

⁹⁵ Paragon, Ware, Dist. Ct. 324; Bell v. Reed, 4 Binn. Penn. 127.

⁹⁶ Hastings v. Pepper, 11 Pick. Mass. 41; Smith v. Whitman, 13 Mo. 352.

⁹⁷ Morrison v. Davis, 20 Penn. St. 171; Fish v. Chapman, 2 Ga. 349; Friend v. Woods, 6 Gratt. Va. 189.

⁹⁸ Fergusson v. Brent, 12 Md. 9; New Brunswick Co. v. Tiers, 4 Zab. N. J. 697; King v. Shepherd, 3 Stor. C. C. 349.

⁹⁹ Miller v. Steam Nav. Co., 10 N. Y. 431; Porter v. Chicago R. R. Co., 20 Ill. 407; Parker v. Flagg, 26 Me. 181.

¹⁰⁰ King v. Shepherd, 3 Stor. C. C. 349.

¹⁰¹ Hazard v. New England Ins. Co., 8 Pet. 557.

¹⁰² Perrin v. Protection Ins. Co., 11 Ohio, 147; Citizens' Ins. Co. v. Glasgow, 9 Mo. 406; Protection Ins. Co. v. Wilson, 6 Ohio, 553.

¹⁰³ Laing v. Calder, 8 Penn. St. 479; Self v. Rapp, 3 Watts & S. Penn. 21.

¹⁰⁴ Nelson v. Woodruff, 1 Black, 156; Callenberg, 1 Black, 170; Brown v. Clayton, 12 Ga. 564; Clark v. Barnwell, 12 How. 272.

¹⁰⁵ Hall v. Renfro, 3 Metc. Ky. 51.

¹⁰⁶ Wilsons v. Hamilton, 4 Ohio St. 722; Richards v. Westcott, 7 Bosw. N. Y. 6.

If the external qualities sufficiently show the necessity of the care, the carrier must take the necessary precautions,¹⁰⁶ as in carrying live stock.

But if the owner has used fraud or artifice to deceive the carrier, and in consequence of it his risk is increased or his vigilance is lessened, the loss which may follow must be borne by the owner.

But after a loss has commenced by inherent defects, the carrier must use the utmost care to prevent the damage from proceeding any farther.¹⁰⁶

1027. Attempts have been made by common carriers to limit their responsibility, by giving notices and making special contracts. This can be done within certain limits. The usual limitations are, that the carrier shall not be responsible for negligence or for more than a certain amount. In order to make such a limitation there must be a special contract either express or implied; it is not enough that the carrier gives notice of his intention, however publicly, or even if brought to the knowledge of the bailor.¹⁰⁷

The reason for this is evident: a common carrier, as we have seen, is obliged to carry goods for all, and under the strictest responsibility. He may within reasonable limits regulate his charges according to the limits of his responsibility, and the bailor may waive his rights in consideration of reduced charges. In some cases a general public notice has been held to be sufficient, but this goes on the ground that a contract is implied, the notice being known to the bailor, who impliedly assents, if he does not actually dissent. But it is invariably held that some contract must be proved.¹⁰⁸

Such a contract, if fairly made, is valid;¹⁰⁹ but there is one exception. Public policy forbids that a common carrier should guard himself against his own misconduct, and, however the contract may be drawn, he will still remain liable for fraud, wilful misconduct, or gross negligence.¹¹⁰

When a special contract is set up the burden of proving it is on the carrier,¹¹¹ and when the contract is proved, the burden of proof is still on him to show that the loss was within the exception and without negligence.¹¹²

1028. *The liability of a common carrier begins* when the goods are delivered to him or his agent for transportation and accepted by him. It is a sufficient delivery if the goods are left at a place designated by the carrier, though there is no agent there to receive them.¹¹³ If the goods are placed in the carrier's warehouse and kept there merely as preparatory and accessory to the carriage, the liability is that of a carrier and not of a warehouseman.¹¹⁴

The delivery may be made to the carrier or his authorized agent, and the authority of his agent to receive the goods is governed by the general rules of agency. In general, it may be said that a captain of a vessel, clerk of a steam-

¹⁰⁶ *Clarke v. Rochester R. R.*, 14 N. Y. 470; *New Jersey R. R. v. Pennsylvania R. R.*, 3 Dutch. N. J. 100.

¹⁰⁶ *Chouteaux v. Leech*, 18 Penn. St. 224; *Lynx v. King*, 12 Mo. 272; *Bird v. Cromwell*, 1 Mo. 58.

¹⁰⁷ *Derwort v. Loomer*, 21 Conn. 245; *Fish v. Chapman*, 2 Ga. 349; *Moses v. Boston R. R.*, 32 N. H. 523; *Dorr v. New Jersey Co.*, 11 N. Y. 485.

¹⁰⁸ *Western Co. v. Newhall*, 24 Ill. 466; *Michigan R. R. v. Hale*, 6 Mich. 248.

¹⁰⁹ *New Jersey St. Nav. Co. v. Merchants' Bank*, 6 How. 344.

¹¹⁰ *Berry v. Cooper*, 28 Ga. 543; *Illinois Cent. R. R. v. Morrison*, 19 Ill. 136; *Davidson v. Graham*, 2 Ohio St. 131; *Ashmore v. Pennsylvania Co.*, 4 Dutch. N. J. 180; *Powell v. Pennsylvania R. R.*, 32 Penn. St. 414; *Sager v. Portsmouth R. R.*, 31 Me. 228.

¹¹¹ *American Transp. Co. v. Moore*, 5 Mich. 368; *Western Co. v. Newhall*, 24 Ill. 466; *The Peytona*, 2 Curt. C. C. 21.

¹¹² *Baker v. Brinson*, 9 Rich. So. C. 201; *Berry v. Cooper*, 28 Ga. 543. Held contra that the bailor must prove negligence: *Sager v. Portsmouth R. R.*, 31 Me. 228; *Goldey v. Pennsylvania R. R.*, 30 Penn. St. 242.

¹¹³ *Merriam v. Hartford R. R.*, 20 Conn. 354.

¹¹⁴ *Clarke v. Needles*, 25 Penn. St. 338; *Fitchburg R. R. v. Hanna*, 6 Gray, Mass. 539; *Michigan R. R. v. Shurtz*, 7 Mich. 515.

boat, freight agents and depot masters are authorized to receive, while common seamen, brakemen, etc., are not.¹¹⁵

To constitute a delivery it is necessary that the goods should be placed completely under the control of the carrier. He is not liable, therefore, if the owner or his servant goes with the goods to take care of them and assumes their custody.¹¹⁶

1029. *The liability of the carrier ends* when the goods are deposited at their place of destination. He may there deliver them to the owner's agent or other proper person as consignee or warehouseman, or may by readiness to deliver, with due notice to such person, effect a constructive delivery. If after such constructive delivery they are not removed by the owner, the carrier's liability as such ends, and he is obliged merely to store them, and is responsible only as a depositary.¹¹⁷

It is the general rule in the case of railroads that their liability as carriers ends when the goods are deposited in their warehouse at the end of the route, and they then become merely warehousemen.¹¹⁸ But such a storage is not a delivery if the contract contemplates some further act, as where the goods are to be delivered "on board" a vessel; in this case the carrier's liability continues during the storage and until the goods are delivered "on board."¹¹⁹

A reasonable time must be allowed for the consignee to remove the goods, and the carrier's liability continues for such time.¹²⁰

Railroads and other carriers need not notify the consignee,¹²¹ but it is generally held that a carrier by vessel must give notice.¹²² This distinction is founded on the course of business and the difference of time of delivery. The manner of delivering goods as to time, place, etc., will depend on usage, and the existence of a usage is a question of fact for the jury. It must be reasonable, certain, and well known.¹²³

Where goods are to be carried to their final destination by several successive carriers, the question arises, when the liability of the first carrier terminates. This question is most important in the case of connecting railroads. In general, a railroad contracts only to deliver to the next road, but there is no doubt that by a special contract it may agree to carry to the ultimate destination, the connecting road then acting as its agents.¹²⁴ A receipt for goods directed to a point beyond their terminus is *prima facie* evidence of such a contract, but may be rebutted.¹²⁵

¹¹⁵ *Trowbridge v. Chapin*, 23 Conn. 595; *Chouteau v. St. Anthony*, 11 Mo. 226; *Farmers' Bank v. Champlain Co.*, 23 Vt. 186; *Mayall v. Boston R. R.*, 19 N. H. 122; *Hosea v. McCrory*, 12 Ala. N. S. 349.

¹¹⁶ *Gibson v. Culver*, 17 Wend. N. Y. 305; *White v. Winnisimmet Co.*, 7 Cush. Mass. 156; *Powell v. Mills*, 37 Miss. 691; *Fisher v. Clisbee*, 12 Ill. 344.

¹¹⁷ *Chicago R. R. v. Warren*, 16 Ill. 502; *Stone v. Waitt*, 31 Me. 409; *McHenry v. R. R. Co.*, 4 Harr. Del. 448; *Keystone v. Moies*, 28 Mo. 243; *Rome R. R. v. Sullivan*, 14 Ga. 277; *Thomas v. Boston R. R.*, 10 Metc. Mass. 472.

¹¹⁸ *Morris R. R. v. Ayres*, 5 Dutch. N. J. 393; *McCarty v. New York R. R.*, 30 Penn. St. 247; *Illinois Cent. R. R. v. Alexander*, 20 Ill. 23; *Hilliard v. Wilmington R. R.*, 6 Jones, No. C. 343.

¹¹⁹ *Moore v. Michigan Cent. R. R.*, 3 Mich. 23.

¹²⁰ *Scholes v. Ackerland*, 15 Ill. 474; *Moses v. Boston R. R.*, 32 N. H. 523; *Milwaukee R. R. v. Fairchild*, 6 Wisc. 403; *Miller v. Steam Nav. Co.*, 10 N. Y. 431.

¹²¹ *Michigan R. R. v. Bivens*, 13 Ind. 263; *Porter v. Chicago R. R.*, 20 Ill. 407. Contra, *Michigan Cent. R. R. v. Ward*, 2 Mich. 538.

¹²² *The Peytona*, 2 Curt. C. C. 21; *Price v. Powell*, 3 N. Y. 322; *Crawford v. Clark*, 15 Ill. 561.

¹²³ *Sleade v. Payne*, 14 La. Ann. 417; *Huston v. Peters*, 1 Metc. Ky. 558; *Marshall v. Wells*, 7 Wisc. 1.

¹²⁴ *Perkins v. Portland R. R.*, 47 Me. 573; *Burtis v. Buffalo R. R.*, 24 N. Y. 269; *Noyes v. Rutland R. R.*, 28 Vt. 110; *Naugatuck R. R. v. Waterbury Co.*, 24 Conn. 486.

¹²⁵ *Angle v. Mississippi R. R.*, 9 Iowa, 487; *Kyle v. Laurens R. R.*, 10 Rich. So. C. 382.

The carrier is liable if he deliver goods to the wrong person, and he must show clearly that such person was authorized to receive them, or that he had a right to presume such authority.¹²⁶

1030. A common carrier of goods is entitled, in all cases, to demand the price of carriage before he receives the goods, and, if not paid, he may refuse to take charge of them; if, however, he receives them without the hire being paid, he may afterward recover it by action, and he has a lien on the goods for it, and need not deliver them until it is paid.¹²⁷ This lien covers only the specific freight due on the goods, and not on a general balance. But where a part of a cargo has been delivered, he has a lien on the balance for the whole freight. And on the same principal, he has a lien on one cargo for the freight due on several previous cargoes, the whole being parts of one transaction.¹²⁸

Where the carrier receives goods from other carriers, whose charges for transportation he pays, he has a lien on them for this back freight as well as for his own charges.¹²⁹

The only question arising in this case is, whether the amount of his lien is subject to be reduced for damages done by the previous carriers. The rule is, that he must use reasonable care to see that the goods are in apparent good order; if he does so, he has a lien for the whole freight, and the owner must recover his damages from the first carriers.¹³⁰

A carrier's lien is lost by a delivery, and, when once waived, cannot be recovered.¹³¹ And he has no lien against the owner where the goods have been wrongfully placed in his hands by a third party.¹³²

A carrier has a special property in the goods, and may sue a third person for damage done to them.¹³³

1031. In the ordinary bills of lading the carrier is directed to deliver the goods to the consignee, "he or they paying freight." This is merely a recognition of the lien, and imposes on the carrier no obligation to hold the goods until the freight is paid. The consignor is, in all cases, bound to pay the freight. The consignee is not a party to the contract. If the consignee receives the goods, no contract is necessarily implied, but such a receipt is evidence for the jury, with other circumstances, from which they may infer a promise by the consignee to pay the freight.¹³⁴

1032. *Carriers of passengers* may be divided into two classes—carriers by land and carriers by water. Carriers by land include railroads, stages, omnibuses, and horse-cars, and all others who make a regular occupation of carrying all who may come. They are obliged to carry all passengers who may offer themselves, if they have sufficient accommodation.¹³⁵ But they may exclude all improper persons, or persons who refuse to comply with reasonable regulations,

¹²⁶ Huntress, Dav. Dist. Ct. 82; *Adams v. Blankenstein*, 2 Cal. 413; *Sweet v. Barney*, 23 N. Y. 335.

¹²⁷ *Hunt v. Haskell*, 24 Me. 339; *Langworthy v. New York R. R.*, 2 E. D. Smith, N. Y. 195; *Galena R. R. v. Rae*, 18 Ill. 488.

¹²⁸ *Lane v. Old Colony R. R.*, 14 Gray, Mass. 143; *Fuller v. Bradley*, 25 Penn. St. 120.

¹²⁹ *White v. Vann*, 6 Humphr. Tenn. 70; *Hill v. Leadbetter*, 42 Me. 572.

¹³⁰ *Bissel v. Price*, 16 Ill. 408.

¹³¹ *Bailey v. Quint*, 22 Vt. 474.

¹³² *Clark v. Lowell R. R.*, 9 Gray, Mass. 231; *Robinson v. Baker*, 5 Cush. Mass. 187; *Stevens v. Boston R. R.*, 8 Gray, Mass. 262; *Ames v. Palmer*, 42 Me. 197; *Fitch v. Newbury*, 1 Dougl. Mich. 1.

¹³³ *Deford v. Seinour*, 1 Ind. 532; *White v. Bascom*, 28 Vt. 268; *Farmer v. McCraw*, 26 Ala. n. s. 189.

¹³⁴ *Wooster v. Taw*, 8 All. Mass. 270; *Sanders v. Vanzeller*, 4 Q. B. 260; *Young v. Moeller*, 5 Ell. & B. 755; *MacLachlan*, Shipp. 426.

¹³⁵ *Jencks v. Coleman*, 2 Sumn. C. C. 221; *Pickford v. Grand Junction R.*, 8 Mees. & W. Exch. 372.

or agents of competing lines who take passage for the purpose of injuring their traffic.¹³⁶

1033. Common carriers of passengers are not insurers like common carriers of goods, but being entrusted with human life, they are held to a strict accountability. They must exercise the highest degree of care and diligence and a vigilant supervision, increasing in proportion to the danger of the mode of conveyance.¹³⁷ They must employ suitable drivers, engineers, and other agents; and the employment of a man of known intemperate habits, or notoriously unfit, is gross negligence.¹³⁸

They must provide good cars, coaches, engines, and other conveyances, and must see that the track is in good order, and are liable for all injuries from defects in any of these which might have been prevented by proper care.¹³⁹ Although their agents are competent, the carriers are liable for any injury caused by their negligence. As to what is negligence, the cases might be multiplied indefinitely.¹⁴⁰

A passenger is bound to obey all reasonable regulations. The carrier is not liable for injury to a passenger caused by his own negligence,¹⁴¹ even if the carrier is partly in fault.¹⁴²

1034. A carrier may make reasonable *regulations*, and their validity will depend on their reasonableness. Many questions have arisen in regard to railroads. Thus, although a railroad must carry all who come, it may divide goods into classes at different rates, and it may charge different rates for different trains.¹⁴³ They may require passengers to purchase tickets before entering the cars under penalty of paying more.¹⁴⁴

A ticket may be issued, good only for a certain time or a certain train.¹⁴⁵

1035. Carriers of passengers, like carriers of goods, often attempt to limit their liability by *notices* and special contracts. The usual plan is by notices printed on passage tickets. Thus where free tickets are given, the carrier may exonerate himself from liability for the negligence of his servants.¹⁴⁶ But this limitation does not apply to all free passengers unless the contract is made.¹⁴⁷

1036. Carriers of passengers are liable, as common carriers, for their *baggage*;¹⁴⁸ but to make them thus liable, the baggage must be delivered into their custody,¹⁴⁹ and must be accompanied by the owner as a passenger.¹⁵⁰

The term baggage includes such articles of necessity or personal convenience as are usually or properly carried by passengers as such. Thus it includes

¹³⁶ *Jencks v. Coleman*, 2 Sumn. C. C. 221; *Commonwealth v. Power*, 7 Metc. Mass. 596.

¹³⁷ *Derwort v. Loomer*, 21 Conn. 245; *Fairchild v. California Stage Co.*, 13 Cal. 599; *Galena R. R. v. Fay*, 16 Ill. 558; *Sales v. Western Stage Co.*, 4 Iowa, 547; *Chicago R. R. v. George*, 19 Ill. 510; *Fuller v. Talbot*, 23 Ill. 357; *Bowen v. New York R. R.*, 18 N. Y. 408.

¹³⁸ *Frink v. Coe*, 4 Greene, Iowa, 555.

¹³⁹ *Frink v. Potter*, 17 Ill. 406; *Hegeman v. Western R. R.*, 13 N. Y. 9; *Virginia R. R. v. Sanger*, 12 Gratt. Va. 230.

¹⁴⁰ *Farish v. Reigle*, 11 Gratt. Va. 697; *Nashville R. R. v. Messino*, 1 Sneed, Tenn. 220; *Stockton v. Frey*, 4 Gill, Md. 406; *McKinney v. Niel*, 1 McLean, C. C. 540; *Monroe v. Leach*, 7 Metc. Mass. 274; *New World v. King*, 16 How. 474.

¹⁴¹ *Sims v. Macon R. R.*, 28 Ga. 93; *R. R. Co. v. Aspell*, 23 Penn. St. 147.

¹⁴² *Pennsylvania R. R. v. Zebe*, 33 Penn. St. 318.

¹⁴³ *Chicago R. R. v. Parks*, 18 Ill. 460; *State v. Overton*, 4 Zab. N. J. 435.

¹⁴⁴ *Cleveland R. R. v. Bartram*, 11 Ohio St. 457; *Chicago R. R. v. Parks*, 18 Ill. 460.

¹⁴⁵ *Boston R. R. v. Proctor*, 1 All. Mass. 267.

¹⁴⁶ *Welles v. New York R. R.*, 24 N. Y. 181.

¹⁴⁷ *Todd v. Old Colony R. R.*, 3 All. Mass. 18.

¹⁴⁸ *Jones v. Voorhees*, 10 Ohio, 145; *Powell v. Meyers*, 26 Wend. N. Y. 591.

¹⁴⁹ *Forbes v. Davis*, 18 Tex. 268; *Michigan R. R. v. Meyres*, 21 Ill. 627.

¹⁵⁰ *Wright v. Caldwell*, 3 Mich. 51; *Collins v. Boston R. R.*, 10 Cush. Mass. 506.

pistols, jewelry, money for travelling expenses, carpenter's tools.¹⁵¹ It does not include articles carried as merchandise for sale, or large sums of money for business purposes.¹⁵²

Where an action is brought for the loss of baggage, the owner is usually the only witness able to prove the contents. In most of the states a party is allowed to testify in all cases, but in all the common-law rule, excluding the party's evidence, is relaxed in this case, and the owner is allowed to testify from the necessity of the case.¹⁵³ But this is limited to cases where no other evidence is attainable.¹⁵⁴

1037. *Carriers of passengers by water* are in general bound by the same rules as carriers by land; and liable for the same faults both as to the person and as to the baggage of the passenger.

A captain of a vessel is invested with a very extensive authority. He may make all regulations necessary for the safety and discipline of the ship and oblige passengers to conform to them, placing them in confinement even if necessary. And he is obliged not only to use his utmost skill and care, but to show a proper attention to the needs and the feelings of the passengers.¹⁵⁵

1038. Salutory regulations have been made by congress as to the amount of provisions or sea-stores which must be taken on board of vessels bound to or from the United States, intended for the carriage of passengers; and also as to the number of passengers which vessels may take.¹⁵⁶

Inspectors are also appointed, charged with the duty of inspecting the boilers and machinery of steamers.¹⁵⁷

1039. The post-office is a public institution, established for the general good, and the officers appointed to fulfil the duties incident to it are, first, the post-master-general, who has the superintendence of the whole department; and, secondly, deputy-postmasters, officers who are located over the whole country. It is their duty to receive and send, according to direction, all letters and other mailable matters which are delivered to them. The delivery is usually made by being dropped into a box, at the place where they hold their office.

Deputy-postmasters are not responsible as common carriers,¹⁵⁸ nor are they liable for the secret delinquencies of their sworn assistants,¹⁵⁹ because there has been no default of their own; but when a postmaster is guilty of allowing a person, who is not permitted by law, to act as his assistant; for example, where he allowed one to have the custody of the mail without being sworn according to law, he is responsible for any loss that may happen in consequence,¹⁶⁰ as he is when guilty of negligence or fraud.¹⁶¹

1040. In the next place will be examined the contract of *pawn* or *pledge*, which is the second kind of bailment for the mutual benefit of both parties. Various definitions have been given of this contract, differing but little from each other. A pawn or pledge, (for the term is used as synonymous,) is a con-

¹⁵¹ *Davis v. Michigan R. R.*, 22 Ill. 278; *Doyle v. Kiser*, 6 Ind. 242; *Illinois R. R. v. Copeland*, 24 Ill. 332; *Porter v. Hildebrand*, 14 Penn. St. 129; *Bomar v. Maxwell*, 9 Humphr. Tenn. 621.

¹⁵² *Collins v. Boston R. R.*, 10 Cush. Mass. 506; *Davis v. Michigan R. R.*, 22 Ill. 278; *Whitmore v. Caroline*, 20 Mo. 513.

¹⁵³ *Mad River R. R. v. Fulton*, 20 Ohio, 318; *Johnson v. Stone*, 11 Humphr. Tenn. 419.

¹⁵⁴ *Dibble v. Brown*, 12 Ga. 217; *Pudor v. Boston R. R.*, 26 Me. 458.

¹⁵⁵ *Chamberlain v. Chandler*, 3 Mas. C. C. 245.

¹⁵⁶ Acts of Congr. March 2, 1819; Feby. 22, 1847; March 2, 1847; March 3, 1855, 10 Stat. 715.

¹⁵⁷ Act of Congr. Aug. 30, 1852, 10 Stat. 63.

¹⁵⁸ *Rowning v. Goodchild*, 3 Wils. 443; *Bolan v. Williamson*, 2 Bay. So. C. 551.

¹⁵⁹ *Schroyer v. Lynch*, 8 Watts, Penn. 453.

¹⁶⁰ *Bishop v. Williamson*, 11 Me. 495.

¹⁶¹ *Dunlap v. Monroe*, 7 Cranch, 242, 269; *Schroyer v. Lynch*, 8 Watts, Penn. 453.

tract by which the debtor, or some other person for him, delivers to his creditor personal property to be detained by him as a surety for his claim, which the creditor obligates himself to return to the debtor after his claim shall have been satisfied.¹⁰³ The thing delivered by this contract to the creditor is also called a pawn or pledge, in Latin, *pignus*.

The most usual contract in business is where a debtor delivers bonds, notes or stock as a pledge, or, as it is commonly called, as collateral security.

The party who is in debt and delivers the thing as a security is called the pawnor, and he who receives it, the pawnee.

1041. A pawn or pledge somewhat resembles many other contracts, but still it is not exactly like them. It is like a mortgage, because in both cases the property is given as a security; but it is unlike a mortgage in this, that in a mortgage the title to the property passes to the mortgagee, subject to a right of redemption, while only a special property passes to the pawnee, and the title remains in the pawnor.¹⁰³ It differs from a lien, which is a mere right in a creditor to be paid out of certain property; it is only a privilege. Although the property is delivered in both cases, it differs from a loan, because the thing pledged is not to be used except under special circumstances, when it is for the benefit of the pawnor.¹⁰⁴ It differs from a deposit, because in this contract the property is delivered to the depositary to be kept for the benefit of the depositor, and in a pledge it is to be kept as a security for the payment of a claim. The difference between hypothecation and pledge is this: hypothecation does not require possession to accompany it. The case of bottomry bonds and the claims for seamen's wages are nearly similar to the hypothecation of the civil law; these, however, are rather liens than pledges. Another instance may be mentioned: where a chattel is not in existence, it cannot properly be pledged, because it cannot be delivered, but the creditor has a lien by way of hypothecation, so that his right will attach the moment the chattel is produced.¹⁰⁵

It differs from a conditional sale in this, that a conditional sale, the condition being broken, becomes absolute, and the title vests from the date of the sale without any further act of the vendee, but in case of pledge no title ever vests. The pledgee only has the right to satisfy his debt out of the pledge in the way prescribed. A pledge is always collateral; a conditional sale does not require any other principal debt.

¹⁰³ Pothier, de Nantissement, art. Prél. n. 1. Mr. Justice Story, in his learned treatise on the Law of Bailments, has rejected the definition of Pothier, and adopted that of Domat, because Pothier says that the pawn is to be given "pour la sureté de sa créance," which the learned judge has translated "as security for his debt," taking the meaning of the word in a narrow sense. The word *créance* is not used by Pothier for *debt*, but for *claim*, or for the obligation of the person who owes either money or any other thing; and in the same treatise, "Du Contrat de Nantissement," n. 11, he uses it in the sense of *claim*, where he says, "Il n'importe quelle soit la créance pour sureté de laquelle la chose soit donnée en nantissement." In his Pandects, liv. 12, t. 1, s. 1, Pothier says: "Le prêteur ayant donc renfermé dans ce titre beaucoup de choses relatives à différens contrats, il a dû faire précéder les créances en général, puisque la matière des créances renferme tous les contrats d'après lesquels nous nous en rapportons à la promesse d'autrui, car, comme le dit Celse, le mot *créance est une dénomination générale*." See, as to the true meaning of pawn, 2 Bell, Comm. 20, 5th ed.; Jones, Bailm. 36, 117; Dane, Abr. c. 17, art. 4; Dig. 50, 16, 2, 38; Heineccius, Pand. lib. 20, t. 1, §§ 2, 3, 4, 5; Ayliffe, Pand. 524; Story, Bailm. § 286; Coggs v. Bernard, Ld. Raym. 909, 913; Domat, partie 1, l. 3, t. 1, s. 1, n. 1; Bowyer, Mod. Civ. Law, c. 29, p. 176; Erskine, Inst. B. 3, t. 1, n. 33.

¹⁰⁴ Cortelyou v. Lansing, 2 Caines, Cas. N. Y. 200; Conrad v. Atlantic Ins. Co., 1 Pet. 449; Haven v. Low, 2 N. H. 13; Brown v. Bement, 8 Johns. N. Y. 97; Fletcher v. Howard, 2 Aik. Vt. 115; Lewis v. Stevenson, 2 Hall, N. Y. 63; Gleason v. Drew, 9 Me. 82; Ward v. Sumner, 5 Pick. Mass. 60.

¹⁰⁵ Thompson v. Patrick, 4 Watts, Penn. 414.

¹⁰⁶ Macomber v. Parker, 14 Pick. Mass. 497.

1042. The term pawn, *ex vi termini*, excludes the idea of real estate. When lands are given as security for a debt or other obligation, the title of them is conveyed to the creditor by a mortgage. Things which may be the subject of a pledge or pawn are ordinarily goods and chattels, but money, negotiable instruments and choses in action, and, indeed, any other valuable thing of a personal nature, such as manuscripts and patent rights, may, by the common law, be delivered in pledge. From principles of public policy the pay of soldiers and mariners in the service of the government, pension certificates and school-land certificates, cannot be pledged.¹⁶⁶

A pledge may be made by one having a special property, but only to the extent of his property.

1043. The pawn must be given for a claim, whether it be a debt for money or for the fulfilment of any other engagement. It may be for that of the pawnor or any one else; the claim or engagement may be due, or the pawn may be as a security for a future debt or lawful engagement.¹⁶⁷ If the pawn is given to secure several debts, it will be applied *pro rata*, but will be held until the whole debt is paid; a partial payment does not release it *pro rata*.¹⁶⁸

When the pledge is given to secure a particular debt or contract, it will not authorize the pawnee to retain it for another, unless, from the circumstances, such seems to have been the intention of the parties.¹⁶⁹ But the pawn is liable for all charges incidental to the principal debt, as interest and expenses.

1044. A pledge is not perfect until the thing pledged be delivered. The *delivery* may be actual or constructive.¹⁷⁰ As the pledgee is entitled to retain the pledge against all persons, he must be clothed with the badges of ownership, both to vindicate his title and to guard third parties.¹⁷¹

The statutes of the different states require chattel mortgages to be recorded, but these provisions do not apply to pledges.¹⁷²

And in order that the relation may continue it is necessary that the possession should be continued, though it is immaterial whether the pawn be held by the pawnee or by a third person for his benefit.¹⁷³

1045. By the act of pawning the pawnor enters into an implied agreement or warranty that he is the owner of the property pawned, and that he has a right to pass the title.¹⁷⁴

The pawnor has the right to redeem the pledge, notwithstanding he has not strictly complied with the contract, until the pawnee has taken such steps as to divest him of that right.¹⁷⁵ But the pawnee may deprive him of this right by selling the pawn;¹⁷⁶ and the pawnor will be presumed to have abandoned it after a great length of time.¹⁷⁷

The pawnor has no right to redeem the pledge partially by paying a part of

¹⁶⁶ *Moffatt v. Van Doren*, 4 Bosw. N. Y. 143; *Mowry v. Wood*, 12 Wisc. 413.

¹⁶⁷ *Wolf v. Wolf*, 12 La. Ann. 529.

¹⁶⁸ *Beach v. State Bank*, 2 Cart. Ind. 488; *Kennedy v. Hammond*, 16 Mo. 341; *Mahoney v. Caperton*, 15 Cal. 313.

¹⁶⁹ *Jarvis v. Rogers*, 15 Mass. 389; *Gallist v. Lynch*, 2 Leigh, Va. 493; *St. John v. O'Connell*, 16 Ala. 466.

¹⁷⁰ *Nevan v. Boup*, 8 Iowa, 207; *Wilson v. Little*, 2 N. Y. 443.

¹⁷¹ *Pinkerton v. Manchester R. R.*, 42 N. H. 424. See *Saunders v. Davis*, 13 B. Monr. Ky. 432.

¹⁷² *Doak v. Bank of the State*, 6 Ired. No. C. 309; *Hubert v. Creditors*, 1 La. Ann. 442; *Arendale v. Morgan*, 5 Sneed. Tenn. 703.

¹⁷³ *Day v. Swift*, 48 Me. 368; *Brown v. Warren*, 43 N. H. 43.

¹⁷⁴ *Story, Bailm.* § 354; *Mairs v. Taylor*, 40 Penn. St. 446.

¹⁷⁵ *Cortelyou v. Lansing*, 2 Caines, Cas. N. Y. 200.

¹⁷⁶ 1 Reeves, Hist. Eng. Law, 2 Caines, Cas. N. Y. 200; *Yelv.* 178.

¹⁷⁷ *Mathew, Pres. Ev.* 20, 331; *Waterman v. Brown*, 31 Penn. St. 161.

the debt, and, if several things be pledged for the same engagement, the debtor is not entitled to either until he has entirely fulfilled it.¹⁷⁸

If the principal debt is paid, the title of the pawnee ceases at once, and the pawnor may claim it. It is his duty, however, to demand it, though circumstances may excuse this. His remedy, if the pawn is not returned, is either in trover, or he may bring a bill in equity for its specific return.¹⁷⁹

If the debt has not been paid, the pawnor must tender payment before he is entitled to a return of the pawn; but such tender is not necessary where the pawnee, by his own wrongful acts, has deprived himself of the ability to return, as where he has improperly sold it.¹⁸⁰

1046. In virtue of the pawn, the pawnee acquires a qualified property in the thing, and is entitled to the exclusive possession during the time and for the object for which it is pledged.¹⁸¹

While the pawn is in his possession, the pawnee may use it, when such use is for the benefit of the pawnor; and, if its preservation depends upon its use, it is the duty of the pawnee to use it.¹⁸² If it may be used without injury, and it is used by the pawnee, he does so at his peril. If its use will be injurious to the pawnor, the pawnee is not allowed to use it,¹⁸³ in the absence of any contract.

The rule of civil law is, that where the pawnee uses the pledge, and it produces a profit, he shall account for it to the pawnor, he being allowed his expenses. This is but equity, and, accordingly, it has been holden that where a slave was pledged to secure the payment of a sum of money which had been borrowed, the pawnee was liable in assumpsit for the clear profits of the slave beyond the interest of the debt, the principal having been paid.¹⁸⁴

1047. The principal obligation which arises from the contract of pawn on the part of the pawnee is to return the thing pledged to the pawnor when the obligation of the latter shall have been acquitted. The obligation, like all those made to deliver a certain thing, is extinguished when the thing is lost without the fault of the pawnee, or if it be lost by the fault of the pawnor.

From this principal obligation of returning the pledge, another is a necessary consequence, which is that of taking care of it, during the time it has been pawned, in order to return it afterward. The pawnee is bound to take ordinary care of the pledge by using ordinary diligence. If he does this he will not be responsible for the loss.¹⁸⁵

Where a *chose in action*, as a note, is pledged as collateral security, the pledgee is bound to use ordinary diligence in collecting it when due. If the note is indorsed, he must take proper steps, if necessary, to charge the indorser. An unreasonable delay, after maturity, may, without other proof, render the pledgee liable for the full amount.¹⁸⁶

1048. The pawnee has a double *remedy*. The pledge has been given to

¹⁷⁸ Union Bank v. Laird, 2 Wheat. 390; Elder v. Rouse, 15 Wend. N. Y. 218.

¹⁷⁹ Mayo v. Avery, 18 Cal. 309; Williams v. McClure, 37 Penn. St. 402; Dewart v. Masser, 40 Penn. St. 302; Brown v. Runals, 14 Wisc. 693.

¹⁸⁰ Wilson v. Little, 2 N. Y. 443; Luckett v. Townsend, 3 Tex. 119; Depuy v. Clark, 12 Ind. 427.

¹⁸¹ 2 Sharswood, Blackst. Comm. 396; Bacon, Abr. *Bailment* (B).

¹⁸² Jones, Bailm. 81; Story, Bailm. § 329; Thompson v. Patrick, 4 Watts, Penn. 414.

¹⁸³ Story, Bailm. § 330. See Thompson v. Patrick, 4 Watts, Penn. 414.

¹⁸⁴ Houton v. Holliday, 1 Car. Law Rep. 87, 2 Murph. No. C. 111. See Ross v. Newell, 1 Wash. Va. 14; Davenport v. Tarlton, 1 A. K. Marsh. Ky., 244.

¹⁸⁵ Jones, Bailm. 75; 1 Dane, Abr. c. 17, art. 12; Domat, liv. 1, t. 1, § 4, n. 1; Pothier, du Contrat de Nantissement, n. 34.

¹⁸⁶ Goodall v. Richardson, 14 N. H. 567; Jennison v. Parker, 7 Mich. 355; Slevin v. Morrow, 4 Ind. 425; Powell v. Henry, 27 Ala. n. s. 612; Commercial Bank v. Martin, 1 La. Ann. 344; St. Losky v. Davidson, 6 Cal. 643; Noland v. Clark, 10 B. Monr. Ky. 239.

him as a security for his claim, upon the express or implied condition that if such claim be not satisfied within the time agreed upon, he shall have the right to apply the thing pledged, or its proceeds, to the satisfaction of his claim; this is one of his remedies. As the debt is due, and it is a personal obligation of the debtor, independent of the pledge, it is evident he may bring an action for its recovery, just as if he had no such security; this is his other remedy.

1049. While the relation of pledge is subsisting, and before the principal debt has become due, the pawnee is in general only entitled to retain the possession of the pawn. An exception is made in the case of choses in action, as negotiable notes pledged, for where these became due before the maturity of the principal debt the pawnee is entitled to collect them in his own name, and it is his duty to do so.¹⁸⁷ But after the principal debt is due, and the debtor fails to pay it, the pawnee may sell the pawn. He cannot sell before the debt is due, even where the pledge is of such a nature that the pledgee can easily replace it, and the retaining the specific pledge is immaterial, as where stocks are pledged, and the pledgee offers to return an equal amount of the same stock. Such a sale is a conversion, for the pledgee by so doing renders the pledge liable to his general creditors by mixing it with his own property.¹⁸⁸

Promissory notes and choses in action to which private individuals are parties cannot be sold by the pledgee in any event. His authority in such cases extends only to collection.¹⁸⁹

Bonds issued by governments or corporations, and which are articles of public merchandise, may be sold.¹⁹⁰

The sale may be judicial by proceedings at law or in equity, or by the act of the pledgee out of court. But such a sale must be made publicly at auction to the highest bidder, and notice of the time and place of sale must be given to the pawnor.¹⁹¹

The pawnee is to satisfy his debt and all proper incidental charges from the proceeds of the sale, and must account to the pawnor for the surplus. And conversely, if the proceeds of the sale are not sufficient to satisfy his debt, he may recover the deficit of the debtor.

The pawnee must observe good faith in making the sale, and must account for the true value of the pawn if he sells it improperly.¹⁹² He cannot purchase the pledge himself.

1050. The debt or engagement for which a pawn is given is the principal obligation, and the obligor is personally bound to fulfil it, as if no pledge had been given. The creditor may, therefore, bring an action for the recovery of the debt at any time after it becomes due, without any surrender of the pledge. And if the pawn be lost, or surrendered to the pawnor, or surreptitiously obtained by the latter, or if the pawnee convert it to his own use, and the pawnor recover damages from him, on that account, for its value, the original obligation survives.¹⁹³

1051. Whatever extinguishes the claim which the pawn was given to secure, discharges the pawn, and entitles the pawnor to regain the possession. This may be done in several ways.

¹⁸⁷ *Jones v. Hawkins*, 17 Ind. 550; *Hilton v. Waring*, 7 Wisc. 492; *Dix v. Tully*, 14 La. Ann. 456; *Androscoggin R. R. v. Auburn Bank*, 48 Me. 335.

¹⁸⁸ *Dykens v. Allen*, 7 Hill, N. Y. 497.

¹⁸⁹ *Wheeler v. Newbould*, 18 N. Y. 392; *Nelson v. Wellington*, 5 Bosw. N. Y. 178.

¹⁹⁰ *Morris Canal Co. v. Lewis*, 1 Beasl. N. J. 323.

¹⁹¹ *Washburn v. Pond*, 2 All. Mass. 474; *Davis v. Funk*, 39 Penn. St. 243; *Rankin v. McCullough*, 12 Barb. N. Y. 103.

¹⁹² *Litchfield Bank*, 28 Conn. 575; *Ainsworth v. Bowen*, 9 Wisc. 348.

¹⁹³ *Landon v. Buel*, 9 Wend. N. Y. 80; *Elder v. Rouse*, 15 Wend. N. Y. 218; *Case v. Boughton*, 11 Wend. N. Y. 106.

By payment of the debt, or the discharge of the engagement for which the pawn was given.

By accord and satisfaction.

By taking a new security instead of the old one, with an intention of liquidating the one which was first given, and relying upon the latter, without making any new provision as to the pledge. The effect of this, which the civilians call a novation, has been already explained. But unless there be a clear intention to extinguish the original security, a mere renewal of a claim will not have that effect.

When on a trial between the pawnee and the pawnor on the original claim a final judgment is rendered in favor of the pawnor, the pledge is discharged.

The destruction of the pledge destroys all right to it.

The release of the thing pledged, or a waiver of it, destroys the right which the pawnee had.

1052. Having considered the first class of bailments, where the contract is beneficial to both parties, let us next consider the second class, or those in which the trust is for the benefit of the bailor; these are, deposits; and mandates.

1053. *Deposit* is usually defined to be a naked bailment of goods by one of the contracting parties to another, to be kept by the latter for the former, without reward, and to be returned when the depositor shall require it. The term deposit signifies not only the contract above described, it means also the thing deposited.¹⁹⁴

The party who makes the deposit is called the *depositor*, and he with whom it is made is denominated the *depository*. This subject will be divided into three heads: of the kind of deposits; of the nature of deposits; of the rights and obligations of the parties.

1054. In the civil law deposits are of two kinds, necessary and voluntary. A necessary deposit is one which arises from pressing necessity, as, for instance, in case of fire, shipwreck, or other overwhelming calamity; and thence it is called *miserabile depositum*.¹⁹⁵ A voluntary deposit is such as arises without any such calamity, from the mere consent or agreement of the parties.¹⁹⁶ Although this distinction may be material in the civil law in respect to the remedy, yet in the common law there is no such difference.¹⁹⁷

Deposits are again divided in the civil law into simple deposits and sequestrations; the former are where there is but one party depositor, of whatever number of persons composed, having a common interest; the latter contract is where there are two or more depositors, having each a different and adverse interest. These distinctions give rise to very different considerations in point of responsibilities and rights. Hitherto they do not seem to have been incorporated into the commercial law; though, if cases should arise, the principles applicable to them would scarcely fail of receiving general application, at least so far as they affect the rights and responsibilities of the parties. Cases of judicial sequestration and deposit, especially in courts of chancery and admiralty, may hereafter require the subject to be fully investigated. But few cases have yet occurred where the goods have been lost while in the custody of the law, where it has been requisite to inquire on whom the loss should fall.¹⁹⁸

By the definition of deposit above given, it is required that the thing deposited should be returned. There is a kind of deposit where that need not be done, and this has been called an irregular deposit. This takes place when a

¹⁹⁴ See Bacon, *Abr. Bailment*; Inst. 3, 15, 3; Nov. 73 and 78; Pothier, *Du Dépôt*; Domat, *partie 1*, liv. 3, t. 1, s. 5, n. 26; Code 4, 34; Jones, *Bailm.* 36, 117; Story, *Bailm.* § 41; Pothier, *Du Dépôt*, art. prél. n. 1; La. Code, art. 2897.

¹⁹⁵ La. Code, art. 2935.

¹⁹⁷ Jones, *Bailm.* 48.

¹⁹⁶ Dig. 16, 3, 2.

¹⁹⁸ Story, *Bailm.* § 41-46.

person having a sum of money, which he does not think safe in his own hands, confides it to another, who is to return to him, not the same money, but a like sum, when he shall demand it.¹⁹⁹ The usual deposit made by a person dealing with a bank is of this nature; the title to the money so deposited vests in the depositary, and the depositor becomes a mere creditor of the latter. If the money deposited should be lost, the loss will fall on the depositary.²⁰⁰

There is still another kind of deposit, which for distinction's sake may be called a quasi deposit, because it does not arise *ex contractu*. It is generally governed by the same rules which regulate a common deposit. As the finder of an article is not bound to take possession of it, he assumes a responsibility if he takes the possession. From that moment he is obliged to use ordinary care of the thing. The owner, on the other hand, is bound to pay him back such money as he may have laid out in necessary expenses; and if no owner reclaim the goods they belong to the fortunate finder.²⁰¹

1055. A deposit may be made between any parties competent to contract, and in this respect does not differ from any other contract. The depositor may be the owner of the thing deposited, or he may have only a qualified right in it; indeed when he has only a possession, he may deposit it, and he is entitled to recover it back against every one but the rightful owner.²⁰² The rightful owner may, of course, recover his property from a wrongful holder or from his depositary. If a person receives a thing on deposit which is his own property or afterward becomes so, he is not compelled to return it.²⁰³

1056. The property which is the subject of a deposit must be personal. Real property cannot be given in deposit; when it is given as a security, it is mortgaged. Debts, choses in action, and securities given for them, as bonds, notes and the like, may be deposited.

1057. There must be a *delivery* from the depositor to the depositary of the thing deposited, which he is to keep. This delivery may be made by the agent of the depositor to the agent of the depositary, or by the parties themselves. But when the thing is already in the possession of the depositary, it is not requisite that there should be two deliveries by the depositary to the depositor, and then again from the depositor to the depositary; as, if you had my History of the United States as a pawn, and I pay you the debt I owed you, and we then agree that you shall hold the History on deposit.²⁰⁴

1058. The depositary must also in general assume the deposit voluntarily, for he need not become a depositary against his will. An exception may be made where the deposit is the result of accident or inevitable casualty, as in the case of goods shipwrecked on a person's land. But his consent may be implied, as, where a creditor holds a pledge after payment of the debt.²⁰⁵

1059. The custody must be gratuitous, for if a reward be required, it is no longer a deposit, but a hire of custody. It will remain a deposit, however, although the depositary receive rent for the room occupied as long as he is not compensated for his care in keeping it; and the depositary may be entitled to recover for his expenses in the charge.

1060. The intent of the delivery must be that the depositary shall keep the thing to be returned to the depositor, for if it be for another purpose it will no longer be a deposit. If the delivery be to convey to the depositary the title of the thing, it is a gift, a sale, or a barter, or some other such contract; if to grant

¹⁹⁹ Pothier, Du Dépôt.

²⁰⁰ See 1 Bell, Comm. 557, 558.

²⁰¹ 1 Sharswood, Blackst. Comm. 296; 2 Kent, Comm. 290; Story, Bailm. § 35; Domat, l. 2, t. 9, s. 2, n. 2; Doct. & St. Dial. 2, c. 38; Bacon, Abr. *Bailment*, D.

²⁰² Ayliffe, Pand. 522; Dig. 16, 3, 1, 30; Learned v. Bryant, 13 Mass. 224.

²⁰³ Pothier, Contr. de Dépôt, n. 4, 5.

²⁰⁴ Pothier, Contr. du Lonage, n. 8.

²⁰⁵ Foster v. Essex Bank, 17 Mass. 479.

him the use for his benefit, it is a loan or a hiring; if it is to do something to it for the depositor, it is a loan or a mandate; it is a loan if the depositor receives a compensation, or a mandate if it be done gratuitously.²⁰⁶

1061. *A depositary is liable for gross negligence only; that is, he is bound only to use slight diligence in the care of the deposit.*²⁰⁷ The degree of diligence to be used will vary with the nature and value of the deposit and the particular circumstances of the case. Whether there is gross negligence in any case is a question of fact for the jury. In general, a depositary is not guilty of gross negligence if he takes the same care of the deposit that he does of his own goods; for either it will show such good faith as not to render him liable, or will throw the loss on the depositor for selecting so careless a bailee. But these presumptions may be overcome, and then afford no defence.²⁰⁸

But the liability of the depositary may be narrowed or enlarged by a special agreement, when the depositary will be responsible for the breach of the agreement. Thus, if a particular place is selected by both parties for keeping the deposit, he is not liable though the goods are lost or damaged, the place being unsafe.²⁰⁹

1062. As the care to be taken of a deposit depends very much upon its value, the depositary should be informed of the value and of all other circumstances which increase the care required. If they are kept from his knowledge by the depositor, he will be responsible for only that degree of care which the ostensible character of the goods requires.

A depositary has no right to use the deposit unless its use is essential to its proper care.

1063. The depositary must return the specific article deposited in the same condition as when deposited if possible, with all its increment, if it is of such a nature as to increase; and if a part be lost, the remainder must be returned. If he sells it from necessity, he must return the proceeds. But an improper sale, or a refusal to return it, is a conversion, and he becomes liable.²¹⁰

1064. The depositary must deliver the deposit to the depositor or his agent. But if he is not the lawful owner, and deposited it wrongfully, the owner may recover it of the depositary; and proof of such a delivery is a defence to an action by the depositor.²¹¹ But the depositary is not bound to ascertain the true owner. If, therefore, he redelivers the deposit to the depositor without knowing whether he is the owner or not, he is not liable to the rightful owner.²¹²

1065. If no place is specified, the deposit is to be returned at the place where it is kept.²¹³ The depositary may terminate the contract at any time, giving a reasonable opportunity to remove the goods. The depositor cannot bring an action for non-return until he has demanded the goods, and a return is refused, or the depositary has wrongfully appropriated or converted them.²¹⁴

1066. In some of the states, when property is attached upon mesne process, the officer may deliver the goods attached to some third party, called a receptor, usually a friend of the debtor, who agrees that they shall be forthcoming to satisfy the judgment. The officer has a special property in the goods, and may reclaim them at any time.²¹⁵

²⁰⁶ Pothier, Du Contrat de Dépôt, n. 9.

²⁰⁷ Dart v. Lowe, 5 Ind. 131; Hills v. Daniels, 15 La. Ann. 280.

²⁰⁸ Tracy v. Wood, 3 Mas. C. C. 132.

²⁰⁹ Knowles v. Atlantic R. R. 38 Me. 55.

²¹⁰ Stanton v. Bell, 2 Hawks, No. C. 145; Vaughan v. Webster, 5 Harr. Del. 256.

²¹¹ King v. Richards, 6 Whart. Penn. 418.

²¹² Nelson v. Iverson, 17 Ala. N. S. 216.

²¹³ Higgins v. Emmons, 5 Conn. 76; Mason v. Briggs, 16 Mass. 453.

²¹⁴ Jackman v. Partridge, 21 Vt. 558; Spencer v. Morgan, 5 Ind. 146.

²¹⁵ Gates v. Gates, 15 Mass. 311.

1067. It is held in Vermont and New Hampshire that the receiptor has an action of trover against a wrong-doer, but the contrary is held in Massachusetts and New York.²¹⁶

1068. The second kind of bailment, which is for the benefit of the bailor, is the contract of mandate.²¹⁷ A *mandate* is a contract by which one of the parties entrusts the other with the transaction of one or more affairs, to manage them in his place and at his risk; while the other engages to perform the trust gratuitously, and to be accountable to the former for the performance.²¹⁸

The contracting party, who confides the management of the affair to the other, is called the mandator, and he who accepts the charge, mandatary.

1069. The mandate must be in relation to some lawful and definite act to be done *in futuro*; it must be about some business to be done *negotium gerendum*; not a thing already done, *negotium gestum*, for this cannot be the object of the contract. The mandatary must be able to perform the mandate, for otherwise it would be nugatory, as if you engaged a dumb man to deliver a verbal message or to teach your son to read.²¹⁹ The business to be done must not concern the mandatary, as, if I request you to do a certain thing in which you alone have an interest, it is not a mandate, but merely advice I give you. But it is not requisite that the business which I request you to perform should concern me alone, in whole or in part, provided I have an interest in its performance.

In the common law the mandate is confined to personal property; contracts relating to real estate of the same nature would not be classed among mandates, but would be treated merely as special undertakings.²²⁰

1070. Like the contract of deposit, the mandate must be *gratuitous*, for if any consideration is paid it will change its nature and make it a hiring; *mandatum nisi gratuitum nullum est*.²²¹ The employment of counsel in England, and perhaps in some of the United States, is considered as a mandate, and he cannot therefore recover fees; whatever is given is considered as a voluntary gift, an *honorarium*. But if a client should employ an advocate and at the time of giving such mandate he should promise to give him a copy of the Pandects, which he observed he wanted in his library, this would not be considered a payment, but a token of gratitude; for his talents in defending his cause are not appreciable.²²² Such, at least, is the doctrine of the civil law.²²³ But when an attorney who is entitled to compensation performs such business confided to him, the contract is that of hiring.²²⁴

1071. It is of the essence of the contract that the mandator should intend to require the mandatary to take charge of the mandate, and to agree that it should be at his risk, and that he would indemnify the mandatary; the latter, on his part, should agree to attend to the business. A mandate differs from a mere recommendation. Fraud, imposition, or mistake, would have the effect of destroying an apparent consent, and where there was no consent, express or implied, there would be no contract.²²⁵

1072. No particular form is requisite in making this contract in order to

²¹⁶ Thayer v. Hutchinson, 13 Vt. 507; Hyde v. Noble, 13 N. H. 494; Ludden v. Leavitt, 9 Mass. 104; Miller v. Adsit, 16 Wend. N. Y. 335.

²¹⁷ See Story, Bailm. § 137; Pothier, Pand. lib. 17, t. 1; Wood, Civ. Law, B 3. c. 5; Halifax, Civ. Law, 70; Bowyer, Mod. Civ. Law, c. 39, p. 224; Pothier, Mandat; Inst. 3, 27, in pr.; 1 Brown, Civ. Law, 382.

²¹⁸ Pothier, Mandat, n. 1.

²¹⁹ Pothier, Mandat, n. 12.

²²⁰ Story, Bailm. § 141.

²²¹ Pothier, Mandat, n. 28.

²²² See before, 1005.

²²³ Pothier, Mandat, n. 18, 19, 20; Lethbridge v. Phillips, 2 Stark. 544.

²²¹ Dig. 17, 1. 4; Inst. 3, 27.

²²³ Dig. 50, 13, 12.

give it validity. It may be oral or in writing, express or implied, under seal or otherwise. The contract may be varied at pleasure; it may be absolute or conditional, general or special, temporary or permanent.²²⁸

1073. As the *mandatary* has no special property in the mandate, his duties toward the mandator, as to the care he is to take of the mandate, are similar to those of a depositary; he will be *liable only for gross negligence*.²²⁷

But a mandatary who is known to possess a certain skill, and agrees, either expressly or by implication, to exert it in the particular case, is required to exercise competent skill.²²⁸ He is not bound for non-feasance, because he is not bound to perform a work without consideration; but if he once undertake it, he is obliged to perform it as the law requires.²²⁹

After the work has been performed, the mandatary is bound to return the property with all its increase.

Upon principles of justice, the mandatary is bound to render an account of the trust reposed in him, and to show how it has been performed. In this account the mandatary is entitled to a credit for all necessary expenses and charges to which he has been subjected by the trust.

1074. Although the mandate is to be without reward, yet, upon the plainest principles of justice, the mandator must be liable to the mandatary in certain cases, though perhaps no authorities can be found to support them except what flow from sound reason and equity.

When the mandatary must incur expenses, it must be presumed, in the absence of any agreement, that the mandator will reimburse the mandatary, who expended his money for him.

When the mandatary has been obliged to enter into collateral contracts in order to accomplish the principal, the mandator will, on the principles of justice and the presumed intention of the parties, be considered to have agreed to indemnify him.

1075. It has already been observed that when the mandatary refuses to accept of the mandate, he cannot be sued for non-feasance. In that case, in truth no contract was ever made, because there was no consent of one of the parties. But in such case the property bailed is to be restored to the mandator. And the mandatary, or person to whom goods may have been sent, in order to make him such, is bound to act with some care in protecting the property from injury until it is returned, and not with gross negligence.

1076. After it has been formed, *the contract may be dissolved* in various ways:

By the death of the mandatary, where the mandate remains wholly unexecuted. If it be in part executed, there may be in some cases a personal obligation on the part of his representatives to complete it.²³⁰ When there are several mandataries, and the trust requires the consent of the whole, the death of one dissolves the contract.²³¹

By death of the mandator. But this applies where the mandate is not exe-

²²⁸ Wood, Civ. Law, 242; Bowyer, Mod. Civ. Law, 226; 1 Domat, B. 1, t. 15, § 1, 6, 7, 8; Pothier, Mandat, n. 34, 35, 36.

²²⁷ Coggs v. Bernard, Ld. Raym. 909; Tompkins v. Saltmarsh, 14 Serg. & R. Penn. 275; Tracy v. Wood, 3 Mas. C. C. 132; Stanton v. Bell, 2 Hawks, No. C. 145; Sodowsky v. McFarland, 3 Dan. Ky. 205; Bland v. Warmack, 2 Murph. No. C. 373; Beardslee v. Richardson, 11 Wend. N. Y. 25; Whitney v. Lee, 8 Metc. Mass. 91; Skelley v. Kahn, 17 Ill. 170; Kemp v. Farlow, 5 Ind. 462.

²²⁹ Shells v. Blackburne, 1 H. Blackst. 158.

²³⁰ Inst. 3, 27, 11; Thorne v. Deas, 4 Johns. N. Y. 84; Magee v. Bast, 6 J. J. Marsh. Ky. 455; Stephens v. White, 2 Wash. Va. 208.

²³¹ Pothier, Mandat, n. 101.

²³² Bacon, Abr. *Authority* (C); Comyn, Dig. *Attorney* (C. 8); Coke, Litt. 112, b.

cuted ; for if it be executed in part at the time, it is binding to that extent, and his representatives must indemnify the mandatary.²³³

By the express revocation of the mandator.

By the operation of law, as where the mandator sells the property which is the subject of the mandate.²³³

By the change of condition of the mandator, as if either party become insane, or, being a woman, marries before the execution of the mandate.²³⁴

When the power of the mandator ceases over the subject matter of the mandate ; as, if he be a guardian, and the ward attain his full age.²³⁵

1077. In the third class of bailments are to be placed loans for use and loans for consumption. By loan is meant the act by which a person lets another have a thing to be used by him gratuitously, and which is to be returned, either in specie or in kind, agreeably to the terms of the contract. The thing which is thus transferred is also called a loan. But although in general a loan implies that the thing is lent without reward, yet in some cases a consideration is given for the use of the thing, as interest for the loan of money.²³⁶ When a consideration is given, the nature of the contract is changed, and it becomes a hiring.

The bailments of this class may be divided into three kinds: loan for use, or *commodatum* ; loan for consumption, or *mutuum* ; and *promutuum*.

1078. A loan for use is the grant of a thing by one of the parties to the other, to be used by the grantee gratuitously for a limited time, and then to be specifically returned.²³⁷ This contract is called loan for use, after the French jurists, who give it the name of *Prêt à Usage*. It is called, in the civil law, *commodatum*, because the thing is to be restored in specie.²³⁸

He who delivers the thing to be used is called the lender ; the other contracting party who receives the thing to be used is called the borrower.

1079. This contract of loan for use much resembles a gift, but it differs from it in this, that by the loan for use the title to the property does not pass to the borrower, as it does in the case of a gift, but only the right to use the thing ; it is a gift of the use. The loan for use somewhat resembles a loan for consumption, which is called *mutuum*. They both include an act of kindness on the part of the lender and an obligation on that of the borrower, which is to return the thing or its equivalent ; but there is this difference : in the loan for use the lender retains the title to the thing lent, and it is to be returned itself *in individuo*. On the contrary, in the loan for consumption, or *mutuum*, the things loaned being of such a nature that they must be destroyed by use, as grain, cider, money, and the like, the title to the things lent vests in the borrower, and he becomes the debtor to return others of the same kind to the lender.

1080. There must be a thing loaned and to be used for a certain purpose. The thing loaned may be used in the way it has been accustomed to be, according to its nature, or in any other way ; a horse which has been used under the saddle may be used in a carriage, if such is the contract.²³⁹ But unless the intention of the parties can be ascertained, the borrower would be presumed to borrow an article for the use for which it was made ; if one borrowed a bed, and there was neither an express contract as to its use, nor any circumstances to

²³³ Story, Bailm. § 204.

²³³ 7 Ves. Ch. 276.

²³⁴ Bacon, Abr. *Baron*, etc. (E) ; Roper Husb. & W. 69, 73.

²³⁵ Pothier, Mandat, n. 112.

²³⁶ *Nichols v. Fearron*, 7 Pet. 109.

²³⁷ Jones, Bailm. 118 ; Story, Bailm. § 219 ; Pothier, in pr. ; Ayliffe, Pand. 516 ; Inst. 3, 15, 2 ; Dig. l. 13, t. 6, l. 1, 17 ; Domat, l. 1, t. 5, s. 1, n. 1.

²³⁸ *Coggs v. Bernard*, Ld. Raym. 909, 913.

²³⁹ Pothier, *Prêt à Usage*, n. 2.

show the intention of the parties, it would doubtless be the duty of the borrower to use it in no other way than as it was destined to be.

The things which are loaned must be personal property; a loan for use cannot be made of real estate.²⁴⁰ It must be lawful to lend the thing loaned; if A were to lend to B a gun to enable him to commit a robbery, the contract would be void.²⁴¹

1081. If the lender receive any *compensation* for the loan, the contract becomes a hire of a thing; and the rights and obligations of the parties are changed.

1082. In general the borrower has the right to use the thing borrowed, during the time and for the purposes intended between the parties; the right to use the thing bailed is strictly confined to the use, expressed or implied, in the particular transaction, and, by any excess, the borrower will make himself responsible.²⁴² The loan is considered strictly personal, unless from circumstances a different intention may be presumed.²⁴³

The borrower has no special property in the thing lent, but having the right of possession, he may maintain an action of trespass or trover against a mere wrong-doer.²⁴⁴

1083. Being the only person benefitted by the contract, *the borrower* is bound to take extraordinary care of the thing borrowed;²⁴⁵ to use it according to the intentions of the lender; to restore it in proper time; and to restore it in a proper condition.

1084. The borrower is bound to use *extraordinary diligence*, and is responsible for slight neglect in relation to the thing loaned. If he has used the utmost diligence, he is not answerable for the loss which may have happened from inevitable accident.²⁴⁶ The usual expenses incurred in the use of the thing must be borne by the borrower. If a horse be lent, the borrower must pay for his keep during the time of the bailment.

1085. The borrower is bound to use the thing according to *the condition of the loan*; for any excess in the nature, time, manner, or quantity of the use, beyond what may be inferred to be within the intention of the parties, the borrower will be responsible, not only for any damages occasioned by the excess, but also for losses or accidents which could not be foreseen nor guarded against; the law in this respect making him a general insurer to punish him for his breach of the contract.²⁴⁷

1086. One of the principal obligations of the borrower is to *return to the lender the thing loaned*, at the time, in the place, and in the manner contemplated by the contract.²⁴⁸ A failure in any of these respects puts the borrower in default, and renders him liable for future accidents, even without his fault;²⁴⁹ unless, indeed, he be justified by some cause which, in law, will be looked upon as a sufficient excuse; as, to prevent the commission of a crime.²⁵⁰

1087. When the thing bailed has been deteriorated without any default of the borrower, it may be returned at the proper time and place by him, as it

²⁴⁰ *Coggs v. Bernard*, *Ld. Raym.* 913.

²⁴¹ *Duvergier*, *Dr. Civ. Fr.* n. 32.

²⁴² *Jones*, *Bailm.* 58; *Pothier*, *Prêt à Usage*, n. 22; *Erskine*, *Princ. Laws of Scotl.* B. 3, t. 1, s. 9.

²⁴³ *Bringloe v. Morrice*, 1 *Mod.* 210; 3 *Salk.* 271; *Scranton v. Baxter*, 4 *Sandf. N. Y.* 8.

²⁴⁴ *Little v. Fossett*, 34 *Me.* 545. ²⁴⁵ *Howard v. Babcock*, 21 *Ill.* 259.

²⁴⁶ *Jones*, *Bailm.* 65; 1 *Dane*, *Abr. c.* 17, a. 12; *Dig.* 44, 7, 1, 4; *Pothier*, *Prêt à Usage*, n. 48.

²⁴⁷ *Jones*, *Bailm.* 68, 69.

²⁴⁸ *Domat*, 1, 5, 1, 11; *Dig.* 13, 6, 5, 17.

²⁴⁹ *Jones*, *Bailm.* 70; *Pothier*, *Prêt à Usage*, n. 60; *La. Civ. Code*, art 2870; *Erskine*, *Prin. of Laws of Scot.* 3, 1, 9.

²⁵⁰ *Story*, *Bailm.* § 256, 273.

happens then to be. And, on the other hand, if it has increased in value while in the borrower's hands, the lender is entitled to it, in its improved condition, and he is also entitled to all the accessions.

1088. This contract is dissolved by the death of either party, except under special circumstances, or by the change of the state of one of them; as in the case of a woman, by marriage.

1089. *Mutuum*, or *loan for consumption*, is a contract by which the owner of a personal chattel, of the kind called fungibles,²⁵¹ delivers it to another with the agreement that the latter shall consume the chattel, and return at the time agreed upon another chattel of the same kind, number, measure, or weight, to the former, either gratuitously or for a consideration; as, if A lends to B one bushel of wheat, to be used by the latter, so that it shall not be returned to A, but instead of which B will return to A another bushel of wheat of the same quality, at a time agreed upon.

By fungible, in this definition, is meant any personal chattel whatever which consists in quantity, and is regulated by number, weight, and measure, such as corn, wheat, oil, wine, and money.²⁵²

The person who delivers the article to be used is called the lender; the other is called the borrower.

1090. This contract differs essentially from a loan for use, or *commodatum*. In the latter the title to the property in the thing lent remains with the lender, and, if it be destroyed without the fault or negligence of the borrower, the loss will fall on the lender, the rule *res perit domino* applying in such case. On the contrary, by the loan for consumption, or *mutuum*, the title to the thing lent passes to the borrower, and in case of loss he must bear it. *Mutuum* bears a strong resemblance to barter or exchange; in a loan for consumption the borrower agrees to exchange with the lender a bushel of wheat, which he has not, but expects to obtain, for another bushel of wheat which the lender now has and is ready to part with.

1091. To constitute this contract it is necessary that there be something lent which is consumed by use; that it be delivered to the borrower; that the property in the thing be transferred; that the borrower agree to return as much in kind; and that the parties agree on all these things.

1092. There cannot be a loan for consumption unless there be a *thing loaned* which is to be consumed, and it must be lent for that purpose.

1093. It is also of the essence of this contract that the lender *deliver* to the borrower the thing lent. But there are some exceptions to this rule; if A agrees to lend to B one thousand dollars, which money has been already delivered by A to B on a special deposit, the agreement will of itself change the property; while it was on deposit it was at the risk of the depositor, but the moment the contract is turned to a loan the money is at the risk of the borrower, the title to it being then in him.

1094. The *title* to the thing loaned must be transferred to the borrower; a transfer of the possession, without an intention of transferring the property, would not oblige the borrower to return other property of the same kind. It is sometimes difficult to say when the transfer has been made so as to convey the title.²⁵³

1095. The borrower who receives the things loaned must agree to *return* the

²⁵¹ Bouvier, Law Dict. *Fungibles*.

²⁵² Erskine, Pr. Scotch Law, B. 8, t. 1, § 7; Pothier, Prêt de Cons. n. 25; 1 Bell, Comm. 225, n. 2; Story, Bailm. § 284.

²⁵³ Ewing v. French, 1 Blackf. Ind. 353; Hurd v. West, 7 Cow. N. Y. 752, 756, note; Smith v. Clark, 21 Wend. N. Y. 85; Seymour v. Brown, 19 Johns, N. Y. 44; Slaughter v. Green, 1 Rand. Va. 3.

same quantity, weight, or number, of the same kind of goods. If A were to borrow of B one hundred bushels of corn, and agree at a future time to pay him in money, for the corn, one hundred dollars, the contract would not be a loan for consumption, but a sale; and if, instead of money, he agreed to return to him seventy-five bushels of wheat, the contract would be a barter or an exchange.

1096. As in all other contracts, the parties to this must agree upon all the essential matters which belong to it.

1097. As in case of other contracts, the parties to this must have capacity to contract.

1098. The things which must form the object of the contract must be such as are to be consumed by use, which we have described to be fungible; such are those which serve for food to man or to animals, as wheat, corn, oil, cider, wine; and the same may be said of fire-wood. Again, there are others of which there is no natural consumption, but one which is purely civil, as the loan of a sum of money. All those things which are consumed by the use made of them are known under the name of things *quæ pondere, numero, et mensurâ constant*; that is, things which are considered rather as to a certain quantity of weight, number, or measure, than of individuals of which they are composed.

1099. The contract of loan for consumption produces obligations only on one side, that of the borrower to return to the lender goods of the same kind he has borrowed, equal in number, weight, or measure to those borrowed.

1100. When money is lent on interest, which is a loan for consumption, the sum lent is called the principal, and that which is to be paid for the use of it is interest; when such interest exceeds the rate allowed by law, it is called usury.

1101. In the examination of the subject, it is proposed to ascertain: who is bound to pay interest; who is entitled to receive it; on what claim it is allowed; what interest is allowed.

1102. The contractor himself, who has agreed, expressly or by implication, to pay interest, is of course bound to do so.

1103. In many instances where there has been no express loan, yet the party using the money is required to pay interest. For example, executors, administrators, assignees of bankrupts or insolvents, or trustees who have kept money an unreasonable length of time, and who have made it productive, or might have done so, are chargeable with interest.²⁵⁴ Again, a tenant for life must pay interest on incumbrances on the estate.²⁵⁵ And revenue officers of the United States are liable for interest from the time of receiving the money.²⁵⁶ A factor or agent, who does not, with due diligence, remit money to his principal, is also chargeable with interest.²⁵⁷

1104. The lender, either upon an express or implied contract, is entitled to interest.

1105. Executors, administrators, and other trustees, are entitled to interest when *bona fide*, and for some beneficial purpose of the estates they represent, they advance their own money.²⁵⁸

²⁵⁴ *Cox v. Wilcocks*, 1 Binn. Penn. 194; *Say v. Barnes*, 4 Serg. & R. Penn. 116; *Dietrich v. Haft*, 5 Penn. St. 87; *Schieffelin v. Stewart*, 1 Johns. Ch. N. Y. 620; *Boynton v. Dyer*, 18 Pick. Mass. 7.

²⁵⁵ 4 Ves. Ch. 33; 1 Vern. Ch. 404, note by Raithby.

²⁵⁶ *Commonwealth v. Lewis*, 6 Binn. Benn. 266.

²⁵⁷ *Crawford v. Willing*, 4 Dall. 286. See *Nesbitt v. Lawson*, 1 Ga. 275.

²⁵⁸ *Dilworth v. Sinderling*, 1 Binn. Penn. 488; *Jennison v. Hapgood*, 10 Pick. Mass. 77; *Barrell v. Joy*, 16 Mass. 228.

1106. Interest is allowed on *express contracts* when the debtor expressly undertakes to pay interest, and both he and his representatives are liable for it.

1107. It is chargeable on *implied contracts*, as for money lent or lawfully laid out to another's use; for goods sold and delivered, after the customary or stipulated term of credit has expired;²⁵⁹ on bills and notes, if payable at a future day, certain, after they become due; if payable on demand, after the demand has been made, for until then the debtor is presumed to have been ready at all times to discharge his obligation;²⁶⁰ on an account stated, or other liquidated sum, whenever the debtor knows precisely what he is to pay, and when he ought to pay it; on money obtained by fraud, or where it was wrongfully detained;²⁶¹ on money paid by mistake, or recovered on a void execution.²⁶²

Interest is allowed whenever money is advanced or expended for the benefit of a third person at his request.²⁶³ If it is done without his request or knowledge, it is a mere gratuitous loan, and the volunteer has no claim for interest.

1108. Interest is allowed on any liquidated claim or account where there has been demand. As long as an account is open and running no interest accrues, but if the account is stated, rendered to the debtor, and accepted without objection, interest runs from that time.²⁶⁴

But no interest is allowed when the claim is for unliquidated damages and contested claims, sounding in damages.²⁶⁵

1109. In general, interest is allowed on all claims and demands for money loaned *from the time it becomes due*, for then it is the duty of the debtor to pay it, and the law imposes on him the obligation of paying the interest to the creditor, because he is presumed to have made a profit out of the principal.

1110. But if the debtor is prevented from paying it by an express law, the interest is suspended, and he is no longer chargeable with interest; as, where the debtor and creditor are citizens of two nations at war with each other, a law forbidding all intercourse with the enemy would furnish a strong ground for exonerating the debtor from the payment of the interest during the war.²⁶⁶ But the mere circumstance of war existing between the two countries, without such prohibition, will not stop the interest.²⁶⁷

Interest may also be suspended during the time when a party's accounts are before the court for examination; as, where a guardian or trustee's accounts are before the court for confirmation.²⁶⁸

1111. By *simple interest* is meant the interest on the principal of the sum lent only, without interest being allowed on the interest which is due and unpaid.

²⁵⁹ *Knox v. Jones*, 2 Dall. 193; *Breyfogle v. Beckley*, 16 Serg. & R. Penn. 264. Considerable difference exists in the several states of the Union as to the right of charging interest on open accounts. In some of them no interest is allowed on such accounts, unless there has been a special agreement, or the charge of interest is allowed by the course of trade. *Nagle v. Chisolm*, Harp. So. C. 274; *Skirving v. Stobo*, 2 Bay, So. C. 233; *Listard v. Graves*, 3 Caines, N. Y. 225; *Temple v. Belding*, 1 Root, Conn. 314; *Van Beuren v. Van Gaasbeck*, 4 Cow. N. Y. 496.

²⁶⁰ *Jacobs v. Adams*, 1 Dall. 52. But see *Collier v. Gray*, 1 Ov. Tenn. 110; *Cannon v. Biggs*, 1 M'Cord, So. C. 170; *Patrick v. Clay*, 4 Bibb, Ky. 246.

²⁶¹ *Renselaer v. Reid*, 3 Cow. N. Y. 426; *Keener v. Bank U. S.*, 2 Penn. St. 237.

²⁶² *Winslow v. Hathaway*, 1 Pick. Mass. 212; *King v. Diehl*, 9 Serg. & R. Penn. 409.

²⁶³ *Ilsley v. Jewett*, 2 Metc. Mass. 168; *Glass Factory v. Reid*, 5 Cow. N. Y. 601.

²⁶⁴ *Gammell v. Skinner*, 2 Gall. C. C. 45; *Walden v. Sherburne*, 15 Johns. N. Y. 424; *Boston Glass Co. v. Boston*, 4 Metc. Mass. 181.

²⁶⁵ *Gilpins v. Consequa*, 1 Pet. C. C. 85; *Willing v. Consequa*, 1 Pet. C. C. 179; *Spier v. Van Orden*, 2 Penn. 652.

²⁶⁶ *Conn v. Penn*, 1 Pet. C. C. 496, 524; *Hoare v. Allen*, 2 Dall. 102; *Foxcraft v. Galloway*, 2 Dall. 132; *Sims v. Willing*, 8 Serg. & R. Penn. 103.

²⁶⁷ *Conn v. Penn*, 1 Pet. C. C. 524.

²⁶⁸ *Dietrich v. Heft*, 5 Penn. St. 87.

In general, the courts will set their faces against adding interest to the interest, as being hard, oppressive, and tending to usury.²⁶⁹

1112. *Compound interest* is that which arises not only from the principal, but also from the interest which is due and unpaid. This is allowed in special cases; in general, where the debtor has been guilty of some wrong or neglect. For example, when executors, administrators, or other trustees convert trust money to their own use, or employ it in business or trade, they are chargeable with compound interest.²⁷⁰ Another example: where a partner has overdrawn the partnership funds, and refuses when called upon to account or to disclose the profits, recourse will be had to compound interest as a substitute for the profits he might be reasonably supposed to have made.²⁷¹

When, after the interest has accrued, the parties agree to turn it into principal, compound interest will be allowed according to their agreement.²⁷²

1113. It is a general rule that the law of the place where a contract is made must govern; if valid there, it is good everywhere, and if illegal there, it is illegal everywhere else.²⁷³ Loans made in a place, accordingly, bear the interest of that place, unless payable elsewhere. Thus, in case of a contract made in China, where a note was given payable eighteen months after date, without any stipulation respecting interest, the court allowed the Chinese interest of one per centum per month from the expiration of the eighteen months.²⁷⁴ But when the contract is made at one place and it is to be performed at another, the interest is to be paid according to the laws of the latter.²⁷⁵

1114. In casting interest on debts carrying interest, upon which partial payments have been made, every payment is to be applied first to pay the interest then due.

When a partial payment exceeds the amount of the interest due when it is made, it is correct to compute the interest to the time of the first payment, add it to the principal, and then subtract the payment; when a second payment is made, add interest on the remainder of the principal from the time of the first to that of the second payment, then deduct the amount of the second payment, and so from payment to payment until the whole shall be paid. But it must be remembered that interest is not in any case to be turned into principal.²⁷⁶

²⁶⁹ *Connecticut v. Jackson*, 1 Johns. Ch. N. Y. 14; *Toll v. Hiller*, 11 Paige, Ch. N. Y. 228; *Von Homert v. Porter*, 11 Metc. Mass. 210.

²⁷⁰ *Schieffelin v. Stewart*, 1 Johns. Ch. N. Y. 620; *Dunscumb v. Dunscumb*, 1 Johns. Ch. N. Y. 508.

²⁷¹ *Stoughton v. Lynch*, 1 Johns. Ch. N. Y. 467; 2 Johns. Ch. N. Y. 209.

²⁷² *Connecticut v. Jackson*, 1 Johns. Ch. N. Y. 13; *Barrow v. Rhinelander*, 1 Johns. Ch. N. Y. 550. See *Bainbridge v. Wilcocks*, Baldw. C. C. 536.

²⁷³ *Pearson v. Dwight*, 2 Mass. 88, 89; *Erskine*, Inst. B. 3, t. 2, § 39-41; *Story*, Conf. of Laws, § 242.

²⁷⁴ *Archer v. Dunn*, 2 Watts & S. Penn. 227, 264; *Bodily v. Bellamy*, 2 Burr. 1094; *Foden v. Sharp*, 4 Johns. N. Y. 183; *Mullen v. Morris*, 2 Penn. St. 85; *Jaffray v. Dennis*, 2 Wash. C. C. 253; *Conqua v. Lauderbrun*, 1 Wash. C. C. 521.

²⁷⁵ *Scofield v. Day*, 20 Johns. N. Y. 102. See *Montgomery v. Budge*, 2 Dow & C. Hou. L. 297; *De Wolf v. Johnson*, 10 Wheat. 367; *Bushby v. Camac*, 4 Wash. C. C. 296; *Davis v. Coleman*, 7 Ired. No. C. 424.

²⁷⁶ *Dean v. Williams*, 17 Mass. 417; *Penrose v. Hart*, 1 Dall. 378; *Spires v. Hamot*, 8 Watts & S. Penn. 18. In the case of *Tracy v. Wikoff*, 1 Dall. 124, McKean, C. J., laid down the rule, that interest of money paid in before the time when due must be deducted from the whole sum due at the time appointed by the instrument; as, on a bond of one hundred dollars, payable in one year with interest; if, at the end of six months, fifty dollars be paid, then the payment should not be apportioned, part to the principal and part to the interest, but, at the end of the year, interest should be charged on the whole sum, and the obligor should receive credit for the fifty dollars, and interest upon this sum for six months. This mode of computation was, however, declared to be illegal, both on principle and authority, and *Tracy v. Wikoff* was overruled. In *Spires v. Hamot*, 8 Watts & S. Penn. 18, the court say, "*Tracy v. Wikoff* has long since ceased to be authority. It has been directly

Where the law regulating interest between the time a note was given and the day it becomes due is changed, and the note is payable with lawful interest, it is evident the parties intended that interest should be charged at the rate which was known when the contract was entered into, and not at any other rate.²⁷⁷

1115. When a debtor makes a tender of money to a creditor for what is due him, he is bound, in case the creditor shall refuse to receive the money, to keep it by him, and to pay the creditor when he shall change his mind and offer to accept it. Under these circumstances it would be hard to make the debtor pay interest for money which he could not use. The law does not allow such injustice. When all the money due is tendered by the debtor to the creditor, and it is refused, the interest ceases. But in this case the debtor must at all times be ready to pay the creditor on demand.²⁷⁸

Whenever the law prohibits the payment of the principal, interest is not recoverable during the prohibition; for where the debtor may have the money ready to pay his debt, as every one is presumed to be able to fulfil his contract, he cannot be said to be in default.²⁷⁹

1116. *Usury*, as already observed, is the illegal profit which is required and received by the lender of a sum of money from the borrower for its use. In a more general sense, it is the receipt of any profit whatever for the use of money. *Usura est quidquid ultra sortem mutuatum exigitur.* It will be used in this section in the first of these senses.

The laws of the several states on the subject of usury vary not only as to the amount of interest which may be lawfully received, but also as to the provisions which operate on the validity of the contract. In some of them the usurious contract is void, in others it may be enforced, but not more than legal interest can be recovered; in some, after the payment of the usury, an action *qui tam* is given for the recovery of a penalty; in others another remedy is given;²⁸⁰ and in some states there are no usury laws, but any rate of interest may be charged.

In general, to make a usurious contract there must be a loan, express or implied; an agreement that the principal shall be returned at all events; not only that the principal shall be returned, but that for such loan a greater interest than that fixed by law shall be paid;²⁸¹ and there must be an intention to violate the law. These will be examined separately, and afterward will be considered the effect of making and completing a usurious contract.

overruled in *Penrose v. Hart*, 1 Dall. 378; *The Commonwealth v. Miller*, 8 Serg. & R. Penn. 458; and *Smith v. Shaw*, 2 Wash. C. C. 167, in accordance with all the English decisions since *Chase v. Box*, 2 Freem. 261, which was the first of them, and decided in 1702.

"The truth is, *Tracy v. Wikoff* is as unfounded in principle as it is in authority; for, calculating interest on payments, the debt would, in course of time, be discharged, both principal and interest, by payment of interest only. The rule established by all other decisions is, that a partial payment is to be applied to the interest in the first place, and in the second to the principal. The reason is, that though interest may be reserved to be paid yearly, half yearly or quarterly, it accrues from day to day, and not like rent from year to year. A creditor may refuse to receive the principal before it is due, or a part of it when due, except on his own terms; and were he to receive it as a payment bearing interest, it would, in effect, be a loan. But if he receive it unconditionally, the residue applied to the principal, after payment of the interest, stops interest on the principal *pro tanto*. The last of the indorsements on this bond purports that the payment was received 'on account of principal and interest,' which is no more than the law would imply. The jury, therefore, were directed to adopt an erroneous rule of computation." See *Commonwealth v. Miller*, 8 Serg. & R. Penn. 458; *Smith v. Shaw*, 2 Wash. C. C. 167; *Fay v. Bradley*, 1 Pick. Mass. 194; *Kissam v. Burrall*, Kirb. Conn. 326.

²⁷⁷ *Lee v. Davis*, 1 A. K. Marsh. Ky. 397.

²⁷⁸ *Kent v. Dunn*, 3 Camb. 296; *Rose v. Brown*, Kirb. Conn. 293.

²⁷⁹ *Hoare v. Allen*, 2 Dall. 102; *Conn v. Penn*, 1 Pet. C. C. 524.

²⁸⁰ See *Bouvier*, Law Dict. *Interest*, for the rates of interest charged in the several states of the Union.

²⁸¹ *Lloyd v. Scott*, 4 Pet. 205.

1117. There must be a loan in contemplation of the parties. It is not, however, necessary that there be a formal and explicit contract; it is sufficient if the secret intention of the parties has been to make a usurious bargain, however it may have been disguised under the false appearance of another contract. These contracts, which have been adopted in such cases for the purpose of covering and disguising a loan which the parties intended to make, are in law considered as loans, and the profit or benefit which the lender derives from them, as usury.

1118. The illegal contract of sale called *mohatra* is an example: in this contract, A having a sum of money which he wishes to lend upon usury, sells an article of property, for example, a horse, to B for two hundred dollars, upon a credit of one year, and takes the purchaser's note for the amount; immediately after the sale, he buys the horse back for one hundred and fifty dollars, which he pays down in cash; in this case it is clear that B will, at the end of one year, be bound by the contract to pay fifty dollars for the use of one hundred and fifty dollars, which is clearly usurious. In this case the law considers the sale as a simulated contract, and that the transaction was a usurious loan.²³²

1119. It may be stated as a general rule, that whatever be the form of the contract, if the intention of the parties were to make a usurious agreement the contract will be tainted by such illegal intention.²³³ But if in appearance the contract appear to be usurious, when in fact it was not intended to make it so, and such appearance was occasioned by a mistake as to a fact, it will not be usurious; as where a greater amount than that allowed by law was charged by a mere miscalculation.²³⁴ An error as to a matter of law, however, will not excuse.²³⁵

1120. When a bond or note, not made for the purpose of being discounted at a greater rate than legal interest, is offered for sale, it may be purchased at any price the parties to it may agree upon when sold by a third party; for, in that case, the maker will not be required to pay more than he would have been bound to have paid if it had remained in the hands of the indorser who sold it. And again, the contract was valid when it was made, and it will not be tainted by any future usurious bargain.²³⁶

But when the original contract is usurious, it will remain so, although there may have been a substitution of a new contract clear of the taint.²³⁷

An agreement to forbear to sue, where a debt is due, upon condition that the debtor will pay usurious interest, is sufficient, and it will have the same effect as if a loan had been made.²³⁸

1121. There must be a contract for the return of the money at all events; for if the return of the principal with interest, or of the principal only, depend upon a contingency, there will be no usury; but if the contingency extend only

²³² Pothier, *Vente*, n. 30; Pothier, *De l'Usure*, n. 88; 1 Duvergier, *Dr. Civ. Fr.* n. 44; Story, *Sales*, § 517. See *Lloyd v. Scott*, 4 Pet. 205; *Moore v. Battie*, *Ambl. Ch.* 371; *Astor v. Price*, 7 Mart. La. N. s. 409; *Bacon, Abr. Usury* (C), Bouvier, ed.; *Lowe v. Waller*, Dougl. 736; *Phillips v. Kirkpatrick*, Add. 126; *Huling v. Drexell*, 7 Watts, Penn. 126, 129; *Shanks v. Kennedy*, 1 A. K. Marsh. Ky. 65; *Douglass v. McChesney*, 2 Rand. Va. 109; *Evans v. Negley*, 13 Serg. & R. Penn. 218; *McGill v. Ware*, 5 Ill. 21; Bouvier, *Law Dict. Mohatra*.

²³³ *Childers v. Deane*, 4 Rand. Va. 406; *Smith v. Beach*, 3 Day, Conn. 268.

²³⁴ *Maine Bank v. Butts*, 9 Mass. 49; *Bank of Utica v. Smalley*, 2 Cow. N. Y. 770; *N. Y. Fire Ins. Co. v. Ely*, 2 Cow. N. Y. 678.

²³⁵ *Maine Bank v. Butts*, 9 Mass. 49.

²³⁶ *Wycoff v. Longhead*, 2 Dall. 92; *Musgrove v. Gibbs*, 1 Dall. 216; *Loyd v. Keach*, 2 Conn. 175; *King v. Johnson*, 3 McCord, So. C. 365; *Churchill v. Sutor*, 4 Mass. 156; *Knights v. Putnam*, 3 Pick. Mass. 184; 9 Pet. 103.

²³⁷ *Chamberlain v. McClurg*, 8 Watts & S. Penn. 31; *Bridge v. Hubbard*, 15 Mass. 96. But see *Kilbourn v. Bradley*, 3 Day, Conn. 356.

²³⁸ *Carter v. Brand*, *Cam. & N. No. C.* 28.

to interest, and the principal be beyond the reach of hazard, the lender will be guilty of usury if he receive interest beyond the amount allowed by law. In the contracts of insurance and of bottomry, the principal is put to hazard, and the parties are not therefore amenable to the laws of usury.

1122. To constitute usury there must be an agreement, express or implied, to pay unlawful interest, for when one of the parties intends and agrees to pay it, and the other does not agree to receive it, and in this respect there is a misunderstanding, the contract is not usurious.²⁸⁹

Whenever a certain gain is reserved to the lender by the agreement, beside the interest, the contract is usurious.²⁹⁰ But this gain must be such as arises solely from the loan, for there are numerous instances where additional compensation has been allowed besides the lawful interest, and yet the contract has been holden not to be usurious; for example, a reasonable commission beyond legal interest for extra incidental charges, as for agency in remitting bills for acceptance and payment.²⁹¹ But it must clearly appear that the additional compensation is not taken for interest.²⁹²

In order to constitute the offence of usury, there must be a loan of money or forbearance to demand the payment of money, and an agreement that for such loan or forbearance, the borrower in the one instance, and the debtor in the other, will pay usurious interest. When a man is indebted to another in a sum of money, payable at a future time, and he is desirous to pay his debt by anticipation, it has been questioned whether he could, *in foro conscientie*, deduct a greater sum from his debt than the legal interest for the time the term has to run;²⁹³ but there can be no question that he may, both at law and in equity, take a greater discount than simple interest.²⁹⁴

The agreement to pay the usurious interest must be positive, for if it be merely conditional and relievable in equity, it will not make the contract usurious, as an agreement to pay a larger sum at a future day, upon the non-payment of the sum agreed upon at a prior day.²⁹⁵

1123. The whole of the three constituent principles of usury must concur in the contract; that is, there must be a loan of money, or forbearance to demand money due; an agreement that the principal shall be secured at all events, and an agreement to pay usury, or the payment of it. But although these may all concur, yet the usury is not complete when there was no intention to commit it, and unless they intended to make the agreement, which is in violation of the usury laws, the contract will not be usurious.²⁹⁶

1124. In some states the simple making of a usurious contract renders it void, and subjects the offending parties to the penalty imposed by the statute; in some others, the contract is not void, but it cannot be enforced beyond the recovery of the principal sum lent and the lawful interest on it; and until the money has been paid back, with the unlawful interest, the borrower has no remedy against the lender. In some states the remedy is by an action *qui tam* to recover the penalty, and in others the proceedings may be by indictment.

1125. Before closing the examination of that class of bailments which are wholly for the benefit of the bailee, it will be proper to take a short view of the

²⁸⁹ *Marsh v. Martindale*, 3 Bos. & P. 154.

²⁹⁰ *Phillip v. Kirkpatrick*, Add. 126; *Delano v. Rood*, 6 Ill. 690.

²⁹¹ *Huling v. Drexell*, 7 Watts, Penn. 126, 129; *Gray v. Brackenridge*, 2 Penn. 75; *Hutchinson v. Hosmar*, 2 Conn. 341; *De Forest v. Strong*, 8 Conn. 513; *Beadle v. Munson*, 30 Conn. 175.

²⁹² *Large v. Passmore*, 5 Serg. & R. Penn. 135; *Steele v. Whipple*, 21 Wend. N. Y. 103.

²⁹³ *Pothier, De l'Usure*, n. 128, 129.

²⁹⁴ *Barclay v. Walmsley*, 4 East, 55, 5 Esp. 11.

²⁹⁵ *Groves v. Graves*, 1 Wash. Va. 1; *Winslow v. Dawson*, 1 Wash. Va. 119.

²⁹⁶ *Chiders v. Dean*, 4 Rand. Va. 406; *Smith v. Roach*, 3 Day, Conn. 268; *Duvall v. Farmers' Bank*, 7 Gill & J. Md. 44.

contract which in the civil law is called *promutuum*; this name has been given because it has much resemblance to a *mutuum*.

Promutuum is a quasi contract by which he who receives a certain sum of money, or a certain quantity of things fungible, which have been paid to him by mistake, contracts toward him who so paid by mistake the obligation to return him as much.

1126. The principal resemblances between *promutuum* and *mutuum* are the following:

In both there must be a delivery of a certain sum of money, or of a certain quantity of things fungible.

The property in the thing must be transferred to the bailee, or the bailee must have consumed it in order to make the contract like *mutuum*.

There is a perfect resemblance in the obligations which arise from both contracts; the bailee must return as much as he has received.

It is in general by a wrongful payment that the quasi contract of *promutuum* arises. And, in this, the contracts differ essentially from each other. *Mutuum* is a contract to which both parties must have assented, and with an intention of fulfilment when the engagement was formed; in case of a *promutuum*, on the contrary, it is not intended by either of the parties to form any contract whatever, for when A pays B the amount of a debt, they both intend, one to pay and the other to receive, only what is justly due; and do not intend to enter into any obligations.

1127. In the common law a presumption has been adopted which, although it seems to be at variance with the facts, is yet effectual for the promotion of justice. It is true that though, generally speaking, there is no contract between the parties when one pays a debt to another by mistake, that the latter will return to the former any part of what is so paid, yet the common law presumes that no one desires to enrich himself at the expense of another, and therefore raises an implied *assumpsit* by which the receiver is presumed to have assumed to return such surplus, and in an action of *assumpsit* for money had and received, such money, paid by mistake, may be recovered.²⁷⁷

1128. The common law has drawn from the civil law the principal rules upon this subject more evidently than in any other branch of the law. With reference to new rules, however, it must be borne in mind, as has before been stated, that while the civil law is referred to with respect as the reservoir of much sound legal learning, too great care cannot be taken to avoid reasoning from false or incomplete analogies from one system to the other. It is their consonance with natural justice which has caused the approval and adoption of these rules, rather than any reverence for their antiquity or deference to the weight of their authority.

²⁷⁷ *Bogart v. Nevins*, 6 Serg. & R. Penn. 369; *Irvine v. Hanlon*, 10 Serg. & R. Penn. 219; *Morris v. Tarin*, 1 Dall. 148; *Wright v. Butler*, 6 Wend. N. Y. 290; *Eddy v. Smith*, 13 Wend. N. Y. 488; *Ogden v. Saunders*, 12 Wheat. 341. See before, 907, note.

CHAPTER IX.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

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1129. Bills of exchange and promissory notes are among the most important instruments used in commerce, both on account of the amount of property which passes by them, and with regard to their general convenience in transferring property from one place to another. A bill of exchange is defined to be an open letter of request from, and order by one or more persons to one or more others, to pay to some third person or persons a sum of money therein mentioned on demand, or at a future time therein specified. A promissory note is defined to be a written engagement by one or more persons to pay another person or persons therein named, absolutely and unconditionally, a certain sum of money on demand, or at a future time therein specified. These instruments

constitute the greater part of the class known as negotiable instruments, though, as we shall see, they are not necessarily negotiable.

1130. *The parties* to a bill of exchange are: the drawer, or he who makes the order; the drawee, or the person to whom it is addressed; the acceptor, or he who undertakes to pay it; the payee, or the party to whom, or in whose favor, the bill is made; the indorser, or he who writes his name on the back of the bill for the purpose of becoming a surety to pay it on condition that the parties before him shall not do so, and also on condition that notice of such non-payment or non-acceptance shall be given to him according to law; the indorsee, or he to whom the bill is transferred by the indorsement; and the holder, who is, in general, one of the parties who is in possession of the bill, and entitled to receive the money therein mentioned.

The parties to a promissory note are: the maker, or he who signs the note; the payee, in whose favor it is drawn; the indorser; the indorsee; the holder.

Some of the parties are sometimes fictitious persons. When a bill or note is made to a fictitious person, and indorsed in the name of a fictitious payee, it is, in effect, a bill or note to bearer, and a *bona fide* holder, ignorant of the fact when he took it, may recover on it against all prior parties who were privy to the transaction.¹ When the drawer and payee are both fictitious persons, the acceptor is held liable to a *bona fide* holder.

1131. *The general essential requisites* of a bill or note are as follows: It must be in writing; an oral order or promise does not constitute a bill or note. The writing may be in ink or pencil.² Of course all except the signature may be printed.

It must be for the payment of money, and not for the delivery of merchandise, or payment in funds which are not a legal currency. If it is to pay in "bank-bills or notes," or "in current bank-notes," &c., it is not a bill or note.³

The money must be payable at all events, not depending on any contingency either with regard to the funds out of which payment is to be made, or the parties by or to whom payment is to be made.⁴

1132. No particular form of words is necessary to constitute a bill or note. It is sufficient that there should be, in the one case, an express order, and in the other, an express promise for the payment of money. A mere acknowledgment of indebtedness is a due bill, and not a note.

The amount of money to be paid must be fixed and certain and not variable,⁵ and it must be payable at some fixed period of time. If the time is not certain at the making of the note, it must be capable of being made certain independently of the maker, or must be upon some future inevitable event. Thus a note may be payable at the death of any one, for all men must die. So if payable at sight or on demand, the time may be made certain without the intervention of the maker.

The person to whom it is payable must be certain, and must be clearly

¹ *Farnsworth v. Drake*, 11 Ind. 101; *Stevens v. Strang*, 2 Sandf. N. Y. 138; *Cooper v. Meyer*, 10 Barnew. & C. 469.

² *Partridge v. Davis*, 20 Vt. 499; *Brown v. Butchers' Bank*, 6 Hill, N. Y. 543.

³ *Fry v. Rousseau*, 3 McLean, C. C. 106; *Wright v. Hart*, 44 Penn. St. 454; *Farwell v. Kennett*, 7 Mo. 595; *Williams v. Mosely*, 2 Fla. 304; *Gray v. Donahoe*, 4 Watts, Penn. 400; *Whiteman v. Childress*, 6 Humphr. Tenn. 303; *Springfield Bank v. Merrick*, 14 Mass. 322. In some of the states, however, such an instrument is considered negotiable: *Judah v. Harris*, 19 Johns. N. Y. 144; *White v. Richmond*, 16 Ohio, 5; *Besancon v. Shirley*, 17 Miss. 457; *Cockrill v. Kilpatrick*, 9 Mo. 697; *Bizzell v. Williams*, 3 Ark. 138.

⁴ *Bunker v. Athean*, 35 Me. 364; *Hubbard v. Mosely*, 11 Gray, Mass. 170; *Washington Ins. Co. v. Miller*, 26 Vt. 77; *Effinger v. Richards*, 35 Miss. 540.

⁵ *Lowe v. Bliss*, 24 Ill. 168; *Palmer v. Ward*, 6 Gray, Mass. 340; *Dodge v. Emerson*, 34 Me. 96.

expressed on the face of the instrument. But this is done by making it payable to A or order, or to bearer, for this is a promise to pay to an indorsee or holder, whoever he may be, and this is capable of certainty at any moment of time. If the payee's name is left blank it may be filled in by any *bona fide* holder, or he may even write a note on a blank piece of paper over the maker's signature, if such was the purpose of his signing.

1133. Among the most important characteristics of bills and notes is their negotiability. This is effected by making them payable to a person or order, in which case they pass by indorsement, or to bearer, when they pass by mere delivery. But negotiability is not an essential quality, and does not exist unless words importing it are used.⁶ As between the original parties, the rights are the same whether the instrument is negotiable or not. But if a non-negotiable note is assigned, the assignment is that of a chose in action, and the assignee holds it subject to the equities between the original parties.

Bills and notes usually state the date of making, but this is not indispensable.⁷ Many of the European codes require it to be dated. A note may be ante-dated or post-dated, and in such case it will ordinarily have the same effect as if made when dated. But the time at which it was actually made may be inquired into when necessary to accomplish justice. The instrument need not state on its face any place of payment. If no place is expressed, a bill is payable at the residence of the drawee, and a note at the residence of the maker. It is usual to insert the words "value received," but these are not essential.⁸ All negotiable instruments import a valuable consideration, and when in the hands of a *bona fide* holder for value, the consideration between the original holders cannot be inquired into. Promissory notes are not usually attested, but in some states an attested note is not barred by the statute of limitations.

Bills of exchange usually contain a statement at the end by way of advice, as "put it to my account," or "to your account," the first when the drawer is in debt to the drawee, the second when the drawee is in debt to the drawer. When the words "as per advice" are used, the drawee need not accept or pay without such advice; if he does, it is at his own risks. The drawer may, as a matter of precaution, require the holder to apply to a third person when the drawee refuses to accept the bill. The requisition is usually in these words: "In case of need, apply to Messrs. A," or "Au besoin ches MM. A."

A clause is sometimes introduced in the bill that in case it should be dishonored it may be returned without expense or protest, by putting the words subscribed by himself, "*sans frais*," or "*retour sans protêt*."

The drawer may limit the amount of damages by making a memorandum in the bill that they shall be a definite sum, as for example, "In case of non-acceptance or non-payment, re-exchange and expenses not to exceed ——— dollars."

Foreign bills of exchange consist generally of several parts. A party who has engaged to deliver a foreign bill is bound to deliver as many parts as may be reasonably requested; the common practice is to deliver three parts. The several parts of a bill are called a set; each part should contain the condition that it should be paid, if the others remain unpaid. The whole set make but one bill.⁹

1134. Bills of exchange are either *foreign* or *inland*. It is foreign when it

⁶ Wells v. Brigham, 6 Cush. Mass. 6; Raymond v. Middleton, 29 Penn. St. 530.

⁷ Dean v. De Lezardi, 24 Miss. 424; M. & F. Bank v. Schuyler, 7 Cow. N. Y. 337.

⁸ Townsend v. Derby, 3 Metc. Mass. 363; Leonard v. Walker, Brayt. Vt. 203.

⁹ Ingraham v. Gibbs, 2 Dall. 134; Durkin v. Cranston, 7 Johns. N. Y. 442; Miller v. Hackley, Anth. N. Y. 68.

is drawn by a person in one country upon a person in another country. Bills drawn by a person in one of the United States upon a person in another state are considered foreign.¹⁰

A bill of exchange is inland when the drawer and drawee live in the same country or state.

1135. The principal difference between a foreign and an inland bill is, that the former must be protested in order to hold the drawer and indorsers bound both for non-acceptance and non-payment, and the latter need not, a notice of dishonor being sufficient in such case.¹¹ Whether protest of a foreign bill for non-acceptance is indispensable, according to the English rule, or whether a protest for non-payment will be sufficient, seems not to be a settled question.¹²

1136. A *letter of credit* is an open letter in which one person requests another to advance money or give credit to a third person up to a certain amount, and promises to repay the same. It may be particular; that is, addressed to some particular person by name; or general; that is, addressed to all merchants or bankers. It is negotiable, though it does not have all the privileges of negotiable bills. The letter writer is directly bound to any person who makes advances on the faith of the letter.¹³

1137. By *indorsement* is understood, in its most extensive sense, what is written on the back of an instrument of writing, and having relation to it; as, a receipt or acquittance on a bond; an assignment on a promissory note. But in the sense this word is used in relation to a bill of exchange or promissory note, payable to order, it is the writing of one's name on the back of such bill or note, with an intent to become a party to it, and to be responsible for its payment on certain conditions.

If the instrument is payable to bearer, it passes by mere delivery, and the party transferring it ceases to be a party to it and does not incur the liabilities of an indorser. Still he incurs certain liabilities, and by implication warrants his title and the genuineness of the bill. Where a bank-bill is given in payment, the bank at the time having failed, but both parties being ignorant of the fact, it is held in general that the payor must bear the loss.¹⁴

1138. An indorsement may be in full, in blank, restrictive, conditional, or qualified.

It is *in full*, when mention is made of the name of the indorser; as, pay to A B, (the indorsee,) or order C D, (the indorser,) or pay to the order of A B.—An indorsement, pay to A B, is in full, the words, or order, being understood.

An indorsement is in blank when the name of the indorser is not mentioned, and the indorser simply writes his name, C D.¹⁵ But a writing or assignment on the face of the note or bill, would, however, be considered to have the force and effect of an indorsement. When the indorsement is once made in blank, the negotiability of the bill cannot be restrained by any special indorsement of a subsequent holder,¹⁶ because when once a bill has been so indorsed, the holder

¹⁰ *Strawbridge v. Robinson*, 10 Ill. 470; *Halliday v. McDougal*, 20 Wend. N. Y. 264; *Buckner v. Finley*, 2 Pet. 586; *Lonsdale v. Brown*, 4 Wash. C. C. 86.

¹¹ *Young v. Bryan*, 6 Wheat. 146; *Union Bank v. Hyde*, 6 Wheat. 572.

¹² 3 Kent, Comm. 95; *Brown v. Barney*, 3 Dall. 365; *Clarke v. Russell*, 3 Dall. 415.

¹³ *Lawson v. Mason*, 3 Cranch, 492; *Adams v. Jones*, 12 Pet. 207.

¹⁴ *Townsend v. Bank of Racine*, 7 Wisc. 185; *Westfall v. Braley*, 10 Ohio St. 188; *Lightbody v. Ontario Bank*, 13 Wend. N. Y. 107; *Fogg v. Sawyer*, 9 N. H. 365; *Wainwright v. Webster*, 11 Vt. 576; *Frontier Bank v. Morse*, 22 Me. 88. Contra, *Young v. Adams*, 6 Mass. 182; *Scruggs v. Gass*, 8 Yerg. Tenn. 175; *Lowry v. Murell*, 11 Ala. 282.

¹⁵ *Chitty, Bills*, 170; 13 Serg. & R. Penn. 315; *Dugan v. U. S.*, 3 Wheat. 183.

¹⁶ *Smith v. Clarke, Peake*, 225; 1 Esp. 180; *Peacock v. Rhodes*, 2 Dougl. 611; *Anon.* 12 Mod. 345.

may strike out all the subsequent indorsements, whether special or not, and he may then recover as the indorsee of the payee.

A *restrictive* indorsement is one which confines the negotiability of the bill, by using express words to that effect; as by indorsing it payable to A B only, or by using other words clearly demonstrating his intention so to do.¹⁷

A *conditional* assignment is one which depends for its validity upon the performance of a condition.

A *qualified* indorsement, which indeed wants one of the qualities of a regular indorsement, namely, the conditional responsibility of the indorser, is a transfer of the bill or note to the indorsee,¹⁸ but without any liability to the indorser; the words usually employed for this purpose are, *sans recours*, without recourse.¹⁹

But although these words will exempt the indorser from all responsibility on the contract, they do not relieve him from the responsibility which he incurs, if the instrument he passes has been forged,²⁰ or stolen.²¹

1139. The indorsement of a negotiable instrument operates as an assignment of the title. If indorsed in blank it must be delivered, and the indorsement in all cases must be with the intention of passing the title. And it operates completely as an assignment, giving the indorsee all the rights and remedies of the indorser against the maker, drawer, and acceptor.

The indorsement of a non-negotiable note or bill, as between the indorser and indorsee, is a complete assignment. In general a suit against the maker must be brought in the name of the payee, though now in some states the indorsee or the assignee of any chose in action may sue in his own name.

Between the payee and his indorsee the same liabilities exist as in the case of a negotiable instrument.²² But there is no privity of contract between the payee and subsequent indorsers, and their only direct remedy, in their own name, is in equity.

1140. The effect of an indorsement in full or in blank is that the indorser contracts in favor of every subsequent indorsee and holder, that the previous signatures and indorsements are genuine, that he has a good title, that he is competent to indorse, that the maker of the note or the acceptor of the bill will pay it at maturity, and that if not so paid the indorser will pay it if properly presented, protested, and due notice given of dishonor.

1141. The preceding principles are laid down in the cases where the indorser is a party to the note as payee or indorsee. But the liability of an indorser is different where he is not a party to the note. If he indorses at the time the note is made, he is considered a guarantor, the guaranty being supported by the consideration of the note.²³ If he indorses it subsequently, he is a guarantor if there is a sufficient consideration.²⁴

1142. The instrument may be indorsed at any time, but the liabilities between the parties depend very much upon the *time of the indorsement*. A *bona fide* indorsee for value before maturity is entitled to recover its full value from all preceding parties, no matter what defences exist between them. It

¹⁷ *Brown v. Jackson*, 1 Wash. C. C. 512; *Drew v. Jacock*, 2 Murph. No. C. 138.

¹⁸ *Epler v. Funk*, 8 Penn. St. 468.

¹⁹ *Chitty, Bills*, 179.

²⁰ *Charnley v. Dulles*, 8 Watts & S. Penn. 353.

²¹ *Frazer v. D'Invilliers*, 2 Penn. St. 200.

²² *Sweetser v. French*, 2 Cush. Mass. 310; *Gadcomb v. Johnson*, 1 Vt. 136; *Commercial Bank v. Wood*, 7 Watts & S. Penn. 89.

²³ *Leonard v. Vredenburg*, 8 Johns. N. Y. 29; *D'Wolf v. Rabaud*, 1 Pet. 476; *Joslyn v. Collinson*, 26 Ill. 61; *Perkins v. Barstow*, 6 R. I. 505.

²⁴ *Sylvester v. Downer*, 20 Vt. 355; *Oxford Bank v. Haynes*, 8 Pick. Mass. 423; *Watson v. McLaren*, 19 Wend. N. Y. 557.

makes no difference in such a case whether there was any consideration for the note or whether it has actually been paid.²⁵ Any other doctrine would require impracticable inquiries and deprive these instruments of their value as negotiable paper.

But an indorsee after the bill is overdue takes it subject to the equities between the preceding parties, and any matters which deprive the payee or the indorser of any remedy against the maker or acceptor will equally affect such an indorsee.²⁶

1143. The acceptance of a bill of exchange is an act by which the drawee or other person evinces his assent or intention to comply with, or be bound by, the request contained in a bill of exchange to pay the same; or, in other words, it is an engagement to pay the bill when due.

Before the acceptance the drawer is the party liable in the first place, but, by accepting, the acceptor takes his place and assumes the primary liability, and the drawer is only liable in case of non-payment by the acceptor.

1144. The acceptance must be made by the drawee himself, or by one authorized by him. On the presentment of a bill, the holder has a right to insist upon such an acceptance by the drawee as will subject him, at all events, to the payment of the bill according to its tenor; consequently, such acceptor or drawee must have capacity to contract and to pay the amount of the bill, or it may be treated as dishonored.²⁷ Once having accepted the bill, the drawee is not bound to reiterate his acceptance; he cannot be asked, therefore, to accept all parts of a set of a bill.²⁸

A treasurer of a corporation accepting a bill without authority does not bind the corporation,²⁹ and one accepting a bill and adding to his name "administrator," is responsible in his individual capacity.³⁰

1145. The acceptance may be made *before* the bill is drawn or *afterward*. When it is made before the bill is drawn, it is only a promise to accept the bill when drawn; such promise binds the promisor.³¹

But there are certain qualifications of this rule. The acceptance must be in writing, and must describe the bill so as completely to identify it; the bill must be drawn a reasonable time after the promise to accept,³² and the rule does not apply at all to bills payable at or after sight.³³

The usual acceptance is after the bill is drawn and before it is due. This must be made within twenty-four hours after presentment, or the bill is dishonored.³⁴ A bill may be accepted after it is due, and even after a refusal to accept.

The bill may be accepted even after it has been protested for non-acceptance, and this is called an acceptance *supra protest*. It may be accepted by any one for the honor of one party to the bill, and it may be so accepted by another for the honor of another party.³⁵

²⁵ *Homes v. Smith*, 16 Me. 177; *Wheeler v. Guild*, 20 Pick. Mass. 545.

²⁶ *Andrews v. Pond*, 13 Pet. 65; *Boggs v. Lancaster Bank*, 7 Watts & S. Penn. 331; *Thompson v. Hale*, 6 Pick. Mass. 259.

²⁷ *Marius*, 22.

²⁸ *Atkinson v. St. Croix Man. Co.*, 24 Me. 171.

²⁹ *Tassey v. Church*, 4 Watts & S. Penn. 346.

³⁰ *Russell v. Wiggins*, 2 Stor. C. C. 213; *Bayard v. Lathy*, 2 McLean, C. C. 462; *Read v. Marsh*, 5 B. Monr. Ky. 8; *Kennedy v. Geddes*, 17 Ala. 263; *Wildes v. Savage*, 1 Stor. C. C. 22.

³¹ *Coolidge v. Payson*, 2 Wheat. 66; *Boyce v. Edwards*, 4 Pet. 111; *Carnegie v. Morrison*, 2 Metc. Mass. 381; *Parker v. Greele*, 2 Wend. N. Y. 545.

³² *Wildes v. Savage*, 1 Stor. C. C. 22.

³³ *Chitty, Bills*, 212, 217.

³⁴ *Beawes, Lex. Merc. Bills of Exchange*, pl. 52.

³⁵ *Pardessus*, n. 365.

1146. The acceptance may be in writing on the bill itself, or on another paper, or it may be oral; or it may be express or implied.

It may be by writing on the bill itself or on a separate piece of paper, but it would seem that the holder has a right to demand an acceptance on the bill itself.

1147. An express acceptance is an agreement in direct and express terms to pay a bill of exchange by the party on whom it is drawn, or some other person, for the honor of some of the parties. It is usually in the words, accepted or accepts, but other words showing an engagement to pay the bill will be equally binding.³⁶

1148. An implied acceptance is an agreement to pay the bill, not by direct and express terms, but from such acts of the parties as would infer an acceptance; for example, if the drawee writes on the bill, seen, presented, or any other thing, as the day on which it becomes due, this, unless explained by circumstances, will be considered an acceptance.³⁷

1149. An acceptance admits the genuineness of the signature of the drawer and his competency,³⁸ and is an agreement to pay the lawful holder according to the tenor of the bill upon proper presentment. It is *prima facie* evidence that the drawer has made provision for the bill, that is, that he has funds in the hands of the drawee.³⁹ As between the holder and acceptor, it is of no consequence whether the drawee has any funds of the drawer in his hands or not; but to entitle the holder to recover from an accommodation acceptor, he must be an innocent holder, for value and without notice.⁴⁰ The effect of an acceptance is either absolute, conditional, or partial.

1150. An *absolute* acceptance is an engagement to pay the bill according to its tenor, and usually by writing on the bill, accepted, and writing the acceptor's name, or by merely writing his name at the bottom or across the bill.⁴¹ But in order to bind another than the drawee it is requisite that his name should appear.⁴²

1151. A *conditional* acceptance is one which will subject the acceptor to the payment of money on a contingency.⁴³ The holder is not bound to receive such an acceptance, but if he do receive it he must observe its terms.

A *partial* or *qualified* acceptance varies from the tenor of the bill; as, where it is made to pay a part of the sum for which the bill is drawn, or to pay at a different time or place, or upon other terms.

1152. In all cases the holder is entitled to have an absolute acceptance, and may reject any other. Still he may take a conditional acceptance, and the acceptor is bound if the condition is fulfilled.⁴⁴ And if the holder is an indorsee, the previous indorsers will be released from all liability unless they are notified and assent to the qualified acceptance.

1153. *Presentment* is the production of a bill of exchange, or promissory note, to the person on whom the former is drawn, for his acceptance, or to the person bound to pay either, for payment. The holder of a bill is bound, in order to hold the parties to it responsible to him, to present it in due time for acceptance, and to give notice, if it be dishonored, to all parties he intends to

³⁶ Spear v. Pratt, 2 Hill, N. Y. 582.

³⁷ Spear v. Pratt, 2 Hill, N. Y. 582; Ward v. Allen, 2 Metc. Mass. 53.

³⁸ Bank of U. S. v. Bank of Georgia, 10 Wheat. 333; Bank of Commerce v. Union Bank, 8 N. Y. 230.

³⁹ Kendall v. Galvin, 15 Me. 131.

⁴⁰ Boggs v. Lancaster Bank, 7 Watts & S. Penn. 331.

⁴¹ Viner, Abr. *Bills of Exchange*, L. 4; Spear v. Pratt, 2 Hill, N. Y. 582.

⁴² Bayley, Bills, 78.

⁴³ Bayley, Bills, 83; Walker v. Little, 1 Rich. So. C. 249.

⁴⁴ Read v. Wilkinson, 2 Wash. C. C. 514; Campbell v. Pettengill, 7 Ma. 126.

hold liable. And when the bill or note becomes payable, it must be presented for payment. The principal circumstances attending presentment are, the person to whom; the place where; and the time when it is to be made.

1154. The presentment for acceptance of a bill should be made on the drawee of a bill, on the acceptor for payment, and on the maker of a note for payment; but a presentment, when the instrument is payable at a particular place, is sufficient if made there. A personal demand on the drawee or the acceptor is not requisite; a demand at his usual place of residence, of his wife or other agent, is sufficient.

A presentment to one of several partners is sufficient,⁴⁵ but if the joint makers or acceptors are not partners, it must be presented to all.⁴⁶ If the maker is dead the note must be presented to his executor or administrator, or, if there is none, at the dwelling-house of the deceased, or at the place at which it is payable.⁴⁷

1155. When the bill is payable at a particular *place*, the presentment may be made there, but when the acceptance is general, the presentment must be at the house or place of business of the party. By place of business is meant the place where a man transacts his affairs. When a man keeps a store, shop, counting-house, or office, independently and distinctly from all other persons, this is deemed his place of business; and when he usually transacts his business at the counting-house, office, or the like, occupied and used by another, that will be considered his place of business, if he has no independent place of his own. But when he has no particular right to use a place for his private purposes, as in an exchange-room or banking-house, an insurance office, and the like, this will not be considered his place of business, although he may transact business there.⁴⁸

1156. The *time of presentment* must be considered with reference: to a presentment for acceptance; a presentment for payment.

When a bill is payable at sight, or after sight, the presentment for acceptance must be made in a reasonable time; and what this reasonable time is depends on the circumstances of each case.⁴⁹ When it is payable on a certain day it need not be presented for acceptance before the day of payment; but if it be, notice must be given if not accepted.⁵⁰

A note or bill must be presented for payment on the very day it becomes due. And it must be presented within reasonable hours of the day; and if to a banker or merchant, this means what usage has established as business hours.⁵¹ A note on demand must be presented within a reasonable time. In ascertaining when a bill or note is due, the day of the date is to be excluded. Thus a note dated the first day of the month, payable ten days after date, is payable on the eleventh.⁵² A month means a calendar month. There is also an allowance of what are called technically days of grace. These are additional days after the

⁴⁵ Dabney v. Stidger, 12 Miss. 749.

⁴⁶ Arnold v. Dresser, 8 All. Mass. 435; Union Bank v. Willis, 8 Metc. Mass. 504; Sayre v. Frick, 7 Watts & S. Penn. 383.

⁴⁷ Landry v. Stansbury, 10 La. 484. But see Hale v. Burr, 12 Mass. 86.

⁴⁸ Story, Bills, § 236; Story, Pr. N. § 312; Chitty, Bills, 8th ed. 502; Williams v. Bank of U. S., 2 Pet. 100; Bank of U. S. v. Hatch, 1 McLean, C. C. 92; Franklin v. Verbois, 6 La. 730.

⁴⁹ Robinson v. Ames, 20 Johns. N. Y. 146; Aymar v. Beers, 7 Cow. N. Y. 705; Depau v. Browne, Harp. So. C. 259; Prescott Bank v. Caverly, 7 Gray, Mass. 221; Bridgeport Bank v. Dyer, 19 Conn. 136; Wallace v. Agry, 4 Mas. C. C. 336.

⁵⁰ Carmichael v. Pennsylvania Bank, 5 Miss. 567; Glasgow v. Copeland, 8 Mo. 268; Bank of Washington v. Triplett, 1 Pet. 25; Townley v. Sumrall, 2 Pet. 170.

⁵¹ Jenks v. Doylestown Bank, 4 Watts & S. Penn. 505; Church v. Clark, 21 Pick. Mass. 310.

⁵² Ammidown v. Woodman, 31 Me. 580.

maturity of the instrument, which may be paid on the first, but need not be paid until the last, day of grace. Their number varies in different countries. In the United States three days of grace are allowed on all bills and notes payable at sight or at a certain time, but not if payable on demand.⁵³

1157. The *excuses for not making a presentment* are applicable to all indorsers generally or to special indorsers only.

1158. Among the excuses applicable to all indorsers may be classed the following:

Inevitable accident or overwhelming calamity, as floods and snows which prevent all travelling, or the sudden illness of the holder.⁵⁴

The prevalence of a malignant disease, by which the ordinary operations of business are suspended.⁵⁵

The breaking out of war between the country of the maker or acceptor and of the holder.⁵⁶

The occupation of the country where the bill or note is payable, or where the parties live, by a public enemy, which suspends commercial operations and intercourse.

The obstruction of the ordinary negotiations of trade by the *vis major*.⁵⁷

Positive interdictions and public regulations of the state which suspend commerce and intercourse.

The utter impracticability of finding the maker or acceptor, or ascertaining his place of residence.⁵⁸

Among the special excuses for not making a presentment, applicable to particular persons, may be enumerated the following:

The holder receiving the note or bill from the payee or other antecedent party too late to make a due presentment. This exception only applies between the immediate parties to this transfer, and does not affect the rights of the preceding indorsers.⁵⁹

The note being an accommodation note of the maker for the benefit of an indorser. In this case the indorser is really the person primarily liable, and want of presentment does not discharge him,⁶⁰ but it will discharge the other indorsers.

A special agreement by which the indorser waives the presentment. Such an agreement made before the maturity of the note entitles the holder to omit presentment.⁶¹

The agreement is to be construed strictly, and not to be extended beyond its terms; and the presentment may be waived by an agreement made after maturity, but this must be clearly established and made upon full knowledge of the facts of the case. No new consideration is necessary in such a case, though some of the courts have inclined the other way.

By an indorser receiving security or money to secure himself from loss or to

⁵³ Hart v. Smith, 15 Ala. n. s. 807; Coffin v. Loring, 5 All. Mass. 153.

⁵⁴ Schofield v. Bayard, 3 Wend. N. Y. 488; Wilson v. Senior, 14 Wisc. 380.

⁵⁵ Roosevelt v. Woodhull, Anth. N. Y. 35; Tunno v. Lague, 2 Johns. Cas. N. Y. 1.

⁵⁶ The Rapid, 8 Cranch, 155; Schofield v. Eichelberger, 7 Pet. 586; House v. Adams, 48 Penn. St. 261; Griswold v. Waddington, 16 Johns. N. Y. 438.

⁵⁷ Patience v. Townley, 2 Smith, 223.

⁵⁸ Ellis v. Com. Bank, 8 Miss. 294; Reid v. Morrison, 2 Watts & S. Penn. 401; Porter v. Judson, 1 Gray, Mass. 175.

⁵⁹ Lenox v. Roberts, 2 Wheat. 273; Mills v. Bank of U. S., 11 Wheat. 431; Robinson v. Blen, 20 Me. 109.

⁶⁰ Shriner v. Keller, 25 Penn. St. 61; Fulton v. Maccracken, 18 Md. 528; Chandler v. Mason, 2 Vt. 193; Agan v. McManus, 11 Johns. N. Y. 180.

⁶¹ Sherer v. Easton Bank, 33 Penn. St. 134; Edwards v. Tandy, 36 N. H. 540; Power v. Mitchell, 7 Wisc. 161; Mills v. Beard, 19 Cal. 158.

pay the note at maturity. When the amount received is sufficient to pay the note or bill, no presentment is required, for the indorser is not damaged by its omission.⁶²

By the holder receiving the note from an indorser as a collateral security for another debt due by him.

1159. When a bill of exchange is not accepted when presented to the drawee for acceptance, or if accepted and it is not paid when presented for payment, it is said to be dishonored, and notice of this fact must be given by the holder to all the parties he intends to hold responsible to him.

The holder must give notice at once to all the indorsers to whom he means to look; but if he merely looks to his immediate indorser, he need notify him only. And any indorser thus notified must notify his preceding indorsers if he means to look to them. He must notify them the next day after he is notified himself.⁶³

1160. No precise form of words is requisite for such a notice, but it must substantially convey—

A true description of the bill or note, so as to ascertain its identity; if, however, it cannot mislead the party to whom it is sent, and it conveys the real fact without any doubt, although there may be a small variance, it cannot be material either to regard his rights or to avoid his responsibility.⁶⁴

The notice must contain an assertion that the bill has been duly presented to the drawee for acceptance, when acceptance has been refused, or to the acceptor of the bill or maker of a note, for payment at its maturity, and dishonored.⁶⁵

The notice must state that the holder, or other person giving it, looks to the person to whom it is given for reimbursement and indemnity.⁶⁶ But although this strictness is required, yet in general it will be presumed, where in other respects the notice is sufficient.⁶⁷

1161. In general, notice must be given by the holder or some one authorized by him, or by some one who is a party and liable on the instrument. A notice given by a stranger is insufficient.⁶⁸

But a party to the note is not a mere stranger, and a notice given by the holder enures to the benefit of all preceding indorsers. On the death of the holder, his executor or administrator must give the notice; when several have a joint interest as holders and one dies, notice must be given by the survivor; a bankrupt holder may give the notice, but it is the duty of his assignee to do so. An infant may give notice, but if he has a guardian the latter should do it.⁶⁹

1162. The holder is required to give notice to all the parties to whom he means to resort for payment, and, unless excused in point of law, as will be mentioned below, such parties will be exonerated and absolved from all liability on such instrument, unless perhaps under special circumstances.⁷⁰ Notice to

⁶² *Andrews v. Boyd*, 3 Metc. Mass. 434; *Prentiss v. Danielson*, 5 Conn. 175.

⁶³ *Lenox v. Roberts*, 2 Wheat. 373; *Bank of Alexandria v. Swann*, 9 Pet. 33.

⁶⁴ *Story, Bills*, 390; *Mills v. Bank of U. S.*, 11 Wheat. 431, 436; *Clark v. Eldridge*, 13 Metc. Mass. 96; *Bank of Cooperstown v. Woods*, 28 N. Y. 545; *Snow v. Perkins*, 2 Mich. 238; *Dennistown v. Stewart*, 17 How. 606.

⁶⁵ See *Cowles v. Harts*, 3 Conn. 517; *Shrieve v. Duckham*, 1 Litt. Ky. 194; *Lockwood v. Crawford*, 18 Conn. 361; *Armstrong v. Thurston*, 11 Md. 157.

⁶⁶ *Story, Bills*, §§ 301, 390; *Chitty, Bills*, 460.

⁶⁷ *Furze v. Sharswood*, 2 Q. B. 388, 416; *Story, Prom. N.* § 353; *Cowles v. Harts*, 3 Conn. 517; *Shrieve v. Duckham*, 1 Litt. Ky. 194; *Townsend v. Lorain Bank*, 2 Ohio St. 354.

⁶⁸ *Walker v. State Bank*, 8 Mo. 704; *Chanoine v. Fowler*, 3 Wend. N. Y. 173.

⁶⁹ *Chitty, Bills*, 368, 8th ed.; *Story, Bills*, § 303; *Story, Prom. N.* §§ 304, 305.

⁷⁰ *Van Wart v. Smith*, 1 Wend. N. Y. 219.

one partner is sufficient,⁷¹ but notice should be given to each of several joint indorsers, who are not partners.⁷² Notice may be given to the agent of an absent indorser.⁷³

1163. The notice of dishonor must be given to the parties within a reasonable time after the dishonor of the bill, when it is dishonored for non-acceptance, and the holder must not delay giving notice until the bill has been presented for non-payment.⁷⁴ Though formerly it was doubted whether the court or jury were to judge as to the reasonableness of the notice in respect of time, yet it seems now to be settled that when the facts are ascertained, it is a question for the court, and not for the jury.⁷⁵

Where both the parties live in the same city or town, the notice must be given so as to reach the indorser the day after the dishonor.⁷⁶ If the parties live in different places, the notice should be sent by post, and must be posted early enough to go by the post on the day after the dishonor.⁷⁷

1164. A distinction is made as to the place where notice is to be given between parties who reside in the same town or place and those who do not.

When both parties reside in the same town or city, the notice should be given either personally or at the domicile or place of business of the party notified,⁷⁸ so that it may reach him on the very day he is entitled to notice.

In general, notice by post is not good unless the notice reaches the indorser the same day.⁷⁹ But evidence of a usage to notify by mail is admitted, and such a notification has in some states been made effectual by statute.⁸⁰

In those towns where they have letter carriers, it is sufficient if the notice be put into the office in time to be delivered the same day.⁸¹

When the parties reside in different towns or cities, the notice may be sent by the post, or a special messenger, or a private person, or by any other suitable or ordinary conveyance.⁸² When the post is resorted to, the holder has the whole day on which the bill becomes due to prepare his notice; and if it be put in the post-office on the next day, in time to go by either mail, when there is more than one, it will in general be sufficient.⁸³

⁷¹ Story, Bills, § 299; Story, Prom. N. § 308; *Rhett v. Poe*, 2 How. 457; *Fuller v. Hooper*, 3 Gray, Mass. 342.

⁷² *Shepard v. Hawley*, 1 Conn. 368; *Sayre v. Frick*, 7 Watts & S. Penn. 383.

⁷³ *Crosse v. Smith*, 1 Maule & S. 545; *Chouteau v. Webster*, 6 Metc. Mass. 1.

⁷⁴ *Lenox v. Leverett*, 10 Mass. 5; *Martin v. Ingersoll*, 8 Pick. Mass. 1; *Duncan v. Course*, 1 Const. So. C. 103. But see *Brown v. Barry*, 3 Dall. 308; *Read v. Adams*, 6 Serg. & R. Penn. 356.

⁷⁵ *United States v. Barker*, Paine, C. C. 156; *Mallory v. Kirwan*, 2 Dall. 192; *Denniston v. Imbrie*, 3 Wash. C. C. 396.

⁷⁶ *Chick v. Pillsbury*, 24 Me. 458; *Blackman v. Leonard*, 15 La. Ann. 59; *Cayuga Bank v. Bennett*, 5 Hill, N. Y. 236.

⁷⁷ *United States v. Barker's Adm'x.*, 12 Wheat. 559; *Whitwell v. Johnson*, 17 Mass. 449; *Lawson v. Farmer's Bank*, 1 Ohio St. 206.

⁷⁸ *Williams v. Bank of the United States*, 2 Pet. 100; *Crosse v. Smith*, 1 Maule & S. 545; Story, Bills, § 284-290.

⁷⁹ *Bank of U. S. v. Corcoran*, 2 Pet. 121; *Power v. Mitchell*, 7 Wisc. 161; *Cabot Bank v. Warner*, 10 All. Mass. 522; *Grinman v. Walker*, 9 Iowa, 426; *Nevins v. Bank*, 10 Mich. 547.

⁸⁰ *Lime Rock Bank v. Hewett*, 52 Me. 51; *Kern v. Von Phul*, 7 Minn. 426.

⁸¹ *Ireland v. Kip*, 11 Johns. N. Y. 231.

⁸² *Chitty*, Bills, 518, 8th ed.; Story, Prom. N. § 324; *Bussard v. Levering*, 6 Wheat. 102; *Munn v. Baldwin*, 6 Mass. 316; *Stanton v. Blossom*, 14 Mass. 116.

⁸³ *Whitwell v. Johnson*, 17 Mass. 449; *Howard v. Ives*, 1 Hill, N. Y. 263; *Bank of Alexandria v. Swann*, 9 Pet. 33; *Denis v. Planters' Bank*, 9 Miss. 261. Contra, *Bank of U. S. v. Merle*, 2 Rob. La. 117. And see also *Chick v. Pillsbury*, 24 Me. 458; *Lawson v. Farmers' Bank*, 1 Ohio St. 206; *Mitchell v. Cross*, 2 R. I. 437; *Manchester Bank v. Fellows*, 28 N. H. 302; *Burgess v. Vreeland*, 4 Zab. N. J. 71; *Stephenson v. Dickson*, 24 Penn. St. 148, that he is allowed a convenient time after the close of business hours of the day next succeeding the dishonor of the bill.

Where the indorser has removed, and his present place of business or domicile is unknown, the holder must make reasonable inquiries and use due diligence to find him, and notify him as soon as he can find where he is.

1165. When properly given and followed by a protest, when a protest is requisite, the notice of dishonor will render the drawer and indorsers of a bill, or indorsers of a note, liable to the holder.

1166. The same reasons which will excuse a presentment will be sufficient to excuse a want of notice.

1167. The party to be affected may waive the notice, but this must be done with full knowledge of the facts, and the waiver must not be obtained by surprise.⁸⁴

A promise to pay the note deliberately made after knowledge of its presentment and dishonor, and of the fact that the holder has not given notice, is a waiver of the indorser's rights, and is valid, although there is no consideration for it.⁸⁵

1168. When a bill or note is not paid upon presentment, notice is given to the parties, and the next thing to be done is to protest it. A *protest* is a notarial act, made for want of a payment of a promissory note, or for want of acceptance or payment of a bill of exchange, by a notary public, in which it is declared that all the parties to such instruments will be held responsible to the holder for all damages, exchanges, re-exchanges, etc. It is dated and signed by the notary and sealed with his official seal.

All foreign bills should be protested, but it is not necessary in the case of inland bills; and no protest is necessary of promissory notes unless required by statute.⁸⁶ But even when not necessary it supplies evidence of a demand and refusal. The necessity of a protest is governed by the law of the place where the bill is made, but its form must be according to the law of the place where the dishonor takes place.

1169. There are two kinds of protests of a bill: one for non-acceptance, which is made before the bill becomes due, on the drawee refusing to accept on presentment of the bill to him by the notary for acceptance; and the other after the bill becomes due, when presented to the acceptor for payment and a refusal or neglect of making it. The protest of a note is always for non-payment.

1170. In making the protest three things are requisite to be done:

The noting, which is a minute made by the notary on the bill or note after it has been presented for acceptance or payment, consisting of the initials of his name, the date when it was made, and the reasons assigned, if any, why it was not accepted or paid, together with his charge. This is, however, only a part of the protest; it will not supply the protest.⁸⁷

The demand, which must be made by a person having authority to receive the money.⁸⁸

The drawing up of the protest, which is a mere matter of form.

1171. The *effect* of the protest, when properly made after presentment and notice, is to hold all the parties to the bill or note responsible to the holder.

1172. The *parties* to a bill or note *will be discharged* from it in a variety of ways, as parties are discharged from other contracts. The most common are payment, satisfaction, bankruptcy, merger, novation, accord and satisfaction,

⁸⁴ Story, Prom. N. § 358.

⁸⁵ Thornton v. Wynn, 12 Wheat. 183; Reynolds v. Douglass, 12 Pet. 497; Creamer v. Perry, 17 Pick. Mass. 332; Ladd v. Kenney, 2 N. H. 340.

⁸⁶ Nicholls v. Webb, 8 Wheat. 326.

⁸⁷ Chitty, Bills, 280, 398. The hour of presentment and protest need not be stated by the notary. Cayuga Bank v. Hunt, 2 Hill, N. Y. 635.

⁸⁸ Carmichael v. Pennsylvania Bank, 5 Miss. 567.

release, covenant not to sue, set-off, confusion, all of which have been considered in a former chapter.

But the maker will not be discharged by payment if the indorsement of the payee is forged. In this case he may recover back the money as paid under a mistake of fact, and his liability to the other parties still continues.⁸⁰ If a note is indorsed in blank, the maker will be discharged by payment to the bearer, although it may have been stolen from the owner, unless paid under such circumstances as ought to excite suspicion.

In addition to these, the act of the holder, giving time to the makers of a note or acceptors of a bill, by which he deprives himself of a right to sue them, however short the time may be, discharges all the other parties from responsibility to him, because then the contract has been changed, and if that has been done without the indorsers' consent, they are not parties to such last contract.⁸⁰ But mere delay in suing, without fraud or any agreement with the maker or acceptor, will not discharge the indorsers.⁸¹ The distinction in this case is between an agreement which creates a new contract to which the indorser is not a party, and a mere forbearance or act of grace which gives the maker no new rights.

1173. *Bank-checks* are a very important class of instruments used in business transactions to a very great extent. A check is a written order addressed to a bank or banker, requesting them to pay to a person or order or bearer a certain sum of money. In form they are like a bill of exchange, but are subject to different rules. They are intended not for circulation, but merely to be given in payment, and to be drawn without delay. They are usually negotiable, and may be passed from hand to hand by indorsement and delivery, like bills. They are payable on presentment, and are not entitled to days of grace.⁸² They do not require acceptance. A custom of certifying exists to some extent, which is very similar to acceptance; it consists in the cashier writing on the check, "good." Whether this constitutes an acceptance or not is a mooted question, but it seems to do so if the cashier is authorized to make the certificate. It is the duty of the holder to present the check within a reasonable time, usually the next day, if the bank is in the same city. If he delays, it is at his own peril, and if the bank should fail meanwhile, the holder must bear the loss.⁸³

As to indorsers of checks, the rules are similar to bills; the same presentment and notice of dishonor are required, but the holder must present the check at once, and any delay on his part discharges the indorsers.

The drawer of a check may countermand its payment at any time before it is presented.

In England a practice prevails of "crossing" checks by writing on the name of a banker with the intent that they shall be paid only through that bank. There is no such usage here; it is customary in some places for the holder to indorse over his signature, "for deposit," when he deposits the check in his bank.

A memorandum check is an ordinary check, having the word "memorandum" written on it. They are designed merely as due-bills or acknowledgment of indebtedness, and not to be drawn, but the holder may draw them if he chooses, the character not being affected by the indorsement.⁸⁴

⁸⁰ *Coggill v. American Bank*, 1 N. Y. 113.

⁸⁰ Bacon, *Abr. Obligations*, D; Story, *Prom. N.* § 414.

⁸¹ Story, *Prom. N.* § 414; *Freemen's Bank v. Rollins*, 13 Me. 202; *Hoffman v. Coombs*, 9 Gill, Md. 284.

⁸² *Woodruff v. Merchants' Bank*, 25 Wend. N. Y. 678.

⁸³ *Veazie Bank v. Winn*, 40 Me. 60; *Kelley v. Brown*, 5 Gray, Mass. 108; *East River Bank v. Gedney*, 4 E. D. Smith, N. Y. 582.

⁸⁴ *Kelley v. Brown*, 5 Gray, Mass. 108; *Dykers v. Leather Mfg. Bank*, 11 Paige, Ch. N. Y. 612. See Parsons, *Notes and Bills*.

CHAPTER X.

INSURANCE, BOTTOMRY, RESPONDENTIA, GAMING AND WAGERS.

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1174. Insurance is a contract by which one of the parties, called the insurer, binds himself to the other, called the insured, to pay him a sum of money, or otherwise indemnify him, in case of the happening of a fortuitous event provided for in a general or special manner in the contract, in consideration of a premium which the latter pays or binds himself to pay to him.

The instrument by which the contract is made is denominated a policy; the events or causes to be insured against, risks or perils; and the thing to be insured, the subject or insurable interest. There are three principal kinds of insurance: marine insurance, life insurance, and fire insurance.¹

1175. *Marine insurance* is a contract by which one party, for a stipulated premium, undertakes to indemnify the other against all perils or sea-risks to which his ship, freight, and cargo, or some of them, may be exposed during a certain voyage, or fixed period of time.

The most perfect good faith is required in this contract. If the insured make false representations to the insurer in order to procure his insurance upon better terms, it will avoid the contract, though the loss may arise from a cause unconnected with the misrepresentation; or if the concealment happen through mistake, neglect, or accident, without any fraudulent intention, for the reason that the insurer was not the less deceived.

1176. Insurance is not distinguished from other contracts in respect to the ability of the parties to contract. Alien enemies cannot be insured.² A policy effected by a person in his own name is applicable only to his own interest.³ An agent may insure for his principal without disclosing his name or national character.⁴ A policy made "for whom it may concern" avails for any one having an interest who can show that it was intended for him.⁵

1177. The policy must specify the *subject* of the insurance, or supply means of ascertaining it. In general, a person having a special interest may insure it under a general description of the subject.⁶ Policies are sometimes made with a stipulation, "sums at risk to be endorsed," or on "goods thereafter to be declared;" and in such cases each endorsement or declaration amounts to effecting a policy on the subject described. And the insured may declare the subject after a loss has taken place.⁷

¹ There are several other kinds of insurance of minor importance, as accident, health, insurance of cattle, etc., and almost any event, the result of which is uncertain, may be the subject of insurance: Phillips, Ins. 3; Paterson v. Powell, 9 Bingh. 320.

² Phillips, Ins. Chap. 2; 1 Marshall, Ins. 35; 1 Duer, Mar. Ins. 463.

³ Watson v. Swann, 11 C. B. N. S. 756; Finney v. Bedford Ins. Co., 8 Metc. Mass. 348; Graves v. Boston Mar. Ins. Co., 2 Cranch, 419; Kemble v. Rhinelander, 3 Johns. Cas. N. Y. 130.

⁴ Seamans v. Loring, 1 Mas. C. C. 127; Davis v. Boardman, 12 Mass. 80; De Bolle v. Penn. Ins. Co., 4 Whart. Penn. 68.

⁵ Phillips, Ins. Chap. 4; Cobb v. New England Ins. Co., 6 Gray, Mass. 192; Haynes v. Rowe, 40 Me. 181; Lawrence v. Sebor, 2 Caines, N. Y. 203; Bauduy v. United Ins. Co., 2 Wash. C. C. 391; Duncan v. Sun Ins. Co., 12 La. Ann. 486.

⁶ Murray v. Columbian Ins. Co., 11 Johns. N. Y. 302; Tappan v. Atkinson, 2 Mass. 365; Bartlett v. Walter, 13 Mass. 267; Russel v. Union Ins. Co., 1 Wash. C. C. 409; Holbrook v. American Ins. Co., 1 Curt. C. C. 193; Ins. Co. v. Woodruff, 2 Dutch. N. J. 541; Bell v. Western Ins. Co., 5 Rob. La. 423; Wolff v. Horncastle, 1 Bos. & P. 316.

⁷ Fairis v. Newburyport Ins. Co., 3 Mass. 476; Stillwell v. Staples, 19 N. Y. 401; Dowville v. Sun M. Ins. Co., 12 La. Ann. 259. Contra, Edwards v. St. Louis Ins. Co., 7 Mo. 882.

If the subject is not actually exposed to the perils, the policy does not attach, and the premium is to be returned, deducting usually one-half per cent.⁸

1178. In the contract of insurance the assured must have an interest at risk. It is not easy to define an *insurable interest*.⁹ It is not confined to an absolute property in the subject, but includes equitable titles, as that of a mortgagor;¹⁰ qualified or special property, as that of a bailee or consignee,¹¹ the interests of creditors having a lien on the subject.¹²

There must be an interest in the subject, such that the peril insured against will bring upon the assured a direct pecuniary loss.¹³ In general, the amount of the insurable interest is measured by the loss which the assured would suffer by the loss of the subject.¹⁴

The policy may be made in reference to a future interest, but the interest must exist at the time of the loss.¹⁵

1179. *Wager policies*, or those made on a pretended subject, which in fact does not exist, are generally void, though formerly at common law they were considered valid.¹⁶ Such policies are usually conceived in the terms, "interest or no interest," or "without further proof of interest than the policy," or "free from average and without benefit of salvage."¹⁷

1180. When an insurer is desirous of lessening his liability, he may procure some other insurer to insure him from loss for the insurance by him made; this is called *reassurance*.

1181. Sometimes an insured may be doubtful of the solvency of his insurer; he is then allowed to make a second or *double insurance* on the same risk and the same interest, but he is not permitted to receive a double satisfaction in case of loss, though he may sue on both policies. The underwriters on the different policies are bound to contribute rateably toward the loss.¹⁸

But it is often stipulated that if the assured has made other insurance prior in date, the underwriters shall be answerable only for so much as the amount of such prior insurance may be deficient toward covering the property.

1182. Whether the insurance be on the goods or the ship, it is an object of great interest to both parties that the latter should be sound and in good order.

There is an implied agreement in every contract of marine insurance which the insured is required to fulfil. The principal stipulations in this implied agreement are: that the ship is sea-worthy; that the adventure is to be pursued in the usual manner, and that no change is to be made in its character without the consent of the insurers; and that she shall be employed, conducted, and navigated with reasonable skill and according to law.

1183. By *sea-worthiness* is meant the ability of a ship or other vessel to

⁸ *Mar. Ins. Co. v. Tucker*, 3 Cranch, 357; *Waddington v. United Ins. Co.*, 17 Johns. N. Y. 23.

⁹ See Phillips, *Ins. Chap. 3*.

¹⁰ *Carter v. Washington Ins. Co.*, 16 Pet. 495, 4 How. 185.

¹¹ *Seamans v. Loring*, 1 Mas. C. C. 127; *Putnam v. Mercantile Ins. Co.*, 5 Metc. Mass. 386.

¹² *Wells v. Philadelphia Ins. Co.*, 9 Serg. & R. Penn. 103.

¹³ *Carter v. Humboldt Ins. Co.*, 12 Iowa, 287.

¹⁴ *Traders' Ins. Co. v. Robert*, 9 Wend. N. Y. 404; *Kernochan v. New York Ins. Co.*, 17 N. Y. 428.

¹⁵ *Carroll v. Boston Mar. Ins. Co.*, 8 Mass. 515; *Copeland v. Mercantile Ins. Co.*, 6 Pick. Mass. 198.

¹⁶ 3 Kent, Comm. 275; Phillips, *Ins. No. 211*; *Lord v. Dall*, 12 Mass. 115; *Hoit v. Hodge*, 6 N. H. 104; *Collamore v. Day*, 2 Vt. 144; *Pritchett v. Ins. Co. of North America*, 3 Yeates, Penn. 461.

¹⁷ *Marshall, Ins. 121*.

¹⁸ *Park, Ins. 374, 375*; *Lucan v. Jefferson Ins. Co.*, 6 Cow. N. Y. 635; *Craig v. Murgatroyd*, 4 Yeates, Penn. 161; *Thurston v. Koch*, 4 Dall. 348; *Millaudon v. Western M. & F. Ins. Co.*, 9 La. 27; *Peoria Ins. Co. v. Lewis*, 18 Ill. 553.

make a sea-voyage with probable success and safety. No man, it is presumed, would venture out to sea with a ship known not to be sea-worthy, and no one would insure such a ship. There is, therefore, an implied agreement and promise on the part of the insured that the ship is sea-worthy when she sails for the voyage insured; that is, that she shall be "tight, staunch, and strong, properly manned, provided with stores, and in all respects fit for the intended voyage."¹⁹ But the implied warranty of sea-worthiness relates only to the commencement of the voyage.²⁰

To be sea-worthy the ship must not only be tight, staunch, and strong, and provided with necessary stores for the voyage proposed, but, as already intimated, she must be properly manned by persons of competent skill and ability to navigate her. If, therefore, she sail without a sufficient number of competent hands to navigate her for her voyage, or if she be suffered to sail in a river or other place of difficult navigation without a pilot properly qualified, the underwriters will be discharged, for this is a breach of the condition.²¹

Whether a vessel was sea-worthy when she sailed is a question of fact for the jury;²² but in some cases it will be presumed that she was not sea-worthy.²³

1184. Not only must the ship be sea-worthy, well manned, and have the proper documents to prove her nationality; she must also be employed in a *lawful voyage*, not only according to the municipal law and the law of nations, but also according to particular treaties between the country to which she belongs and other states.²⁴

1185. Marine insurance is usually for *the voyage*, by which is meant the passage of the ship from the port of departure to the port of her final destination, with all practicable, safe, and convenient expedition.

1186. An insurance made on a voyage undertaken in violation of the laws of the United States, or of the laws of nations, or of the country where the contract has been made, is void, whether the insurer was or was not informed of the illegality of the voyage.²⁵

But the ship may be employed in violating the revenue laws or commercial regulations of a foreign state without vitiating the policy.²⁶

1187. A voluntary departure of a ship from her voyage, without necessity or reasonable cause, from the regular and usual course of the voyage insured,

¹⁹ *Am. Ins. Co. v. Ogden*, 15 Wend. N. Y. 532; *Talcot v. Com. Ins. Co.*, 2 Johns. N. Y. 124; *Talcot v. Marine Ins. Co.*, 2 Johns. N. Y. 130; *Garrigues v. Cox*, 1 Binn. Penn. 592; *Ingraham v. S. Car. Ins. Co.*, Const. So. C. 707; *Warren v. United Ins. Co.*, 3 Johns. N. Y. 231; *Prescott v. Union Ins. Co.*, 1 Whart. Penn. 399; *Myers v. Girard Ins. Co.*, 26 Penn. St. 192; *Firemen's Ins. Co. v. May*, 20 Ohio, 211; *M'Cargo v. Merchants' Ins. Co.*, 10 Rob. La. 334. For a full statement of the decisions as to what constitutes sea-worthiness consult the text books on insurance.

²⁰ *Peters v. Phoenix Ins. Co.*, 3 Serg. & R. Penn. 25; *Hughes, Ins.* 205; *Marshall, Ins.* 165.

²¹ *Marshall, Ins.* 165, *b*. But see *Keeler v. Firemen's Ins. Co.*, 3 Hill, N. Y. 250; *Silva v. Low*, 1 Johns. Cas. N. Y. 184. As to competent master and crew, see *Walden v. F. & M. Ins. Co.*, 12 Johns. N. Y. 128; *Draper v. Commercial Ins. Co.*, 21 N. Y. 378. The gentleman, *Olcott*, Dist. Ct. 110. As to pilot, see *Whitney v. Ocean Ins. Co.*, 14 La. 485.

²² *Union Ins. Co. v. Caldwell*, Dudl. So. C. 263; *Chase v. Eagle Ins. Co.*, 5 Pick. Mass. 51; *Fuller v. Alexander*, 1 Brev. So. C. 149; *Walsh v. Washington Ins. Co.* 32 N. Y. 427.

²³ *Talcot v. Com. Ins. Co.*, 2 Johns. N. Y. 124; *Talcot v. Mar. Ins. Co.*, 2 Johns. N. Y. 130; *Deshon v. Merchants' Ins. Co.*, 11 Mete. Mass. 199; *Parker v. Potts*, 3 Dow, Parl. Cas. 23; *Tidmarsh v. Washington Ins. Co.*, 4 Mas. C. C. 439; *Popleston v. Kitchen*, 3 Wash. C. C. 138; *contra Paddock v. Franklin Ins. Co.*, 11 Pick. Mass. 227; *Field v. Ins. Co. of North America*, 3 Md. 244.

²⁴ *Marshall, Ins.* 177; *Phillips, Ins. No.* 210; *United States v. The Paul Shearman*, 1 Pet. 98.

²⁵ *Craig v. Ins. Co.*, Pet. C. C. 410; *Richardson v. Maine Ins. Co.*, 6 Mass. 102; *Breed v. Eaton*, 10 Mass. 21; *Gray v. Sims*, 3 Wash. C. C. 276.

²⁶ *Gardiner v. Smith*, 1 Johns. Cas. N. Y. 141.

constitutes a *deviation* and a violation of one of the implied warranties. It is not easy to specify all the acts or matters which will be held to amount to a deviation, but a voluntary departure from the usual course of the voyage, or remaining at places where the ship is allowed to touch longer than necessary, or doing there what the insured is not authorized to do, as if the ship having liberty to touch at a port, the insured stay there to trade or to break bulk, is a deviation;²⁷ or if captured, carried into port and released, and the vessel remains in port to trade, it will be a deviation.²⁸ But a mere intention to deviate will not avoid the policy.²⁹ A departure from the usual course, when occasioned by necessity, will not have the effect of avoiding the contract when it can be justified. We will consider what is a justifiable deviation, and afterward the effect of a deviation when it is not justifiable.

1188. To make a deviation, there must be a voluntary departure from the usual course of the voyage insured. But by the course of the voyage is not meant the shortest course the ship can make from her port of departure to her port of destination, but the regular and customary track, if such there be, which long usage has proved to be the safest and the best.³⁰

1189. A deviation may be *justified* from numerous causes, always grounded on a physical or moral necessity, the principal of which are the following:

A deviation may be justified by stress of weather; if, therefore, a ship be driven out of her course by a storm, this shall not avoid the contract, for it is a rule that what is occasioned by the act of God cannot be imputed to any man as his fault.³¹

Another excuse for a deviation is the want of necessary repairs. If a ship be reduced to a state that she cannot proceed safely on her voyage without repairs, the captain will be justified in taking her to some port, the least out of his course, where such repairs can be had, and procure the necessary repairs to be made as soon as possible.

The captain should seek the most accessible port suitable for repairs, but he is not held strictly to a limitation of distance; he must act in good faith and discretion.³² If he does not find supplies at the first port, he may proceed to a second.³³

A departure from the usual course for the purpose of rendering succor to a ship in distress is justified on the ground of necessity. It is a duty which policy as well as humanity imposes on every man who has the means of per-

²⁷ *Coffin v. Newburyport Ins. Co.*, 9 Mass. 436; *Coles v. Marine Ins. Co.*, 3 Wash. C. C. 159; *Snowden v. Phoenix Ins. Co.*, 3 Binn. Penn. 466.

²⁸ *Kingston v. Girard*, 4 Dall. 274.

²⁹ *Snowden v. Phoenix Ins. Co.*, 3 Binn. Penn. 466; 9 Mass. 436; *Hobart v. Norton*, 8 Pick. Mass. 159; *Marine Ins. Co. v. Tucker*, 3 Cranch, 357.

It is perfectly well established that a mere intention to deviate is not of itself a deviation. 1 Arnould, Mar. Ins. 345; *Winter v. Delaware Ins. Co.*, 30 Penn. St. 334; *Marine Ins. Co. v. Tucker*, 3 Cranch, 357; and the cases turn upon the question whether any acts have been done to carry out the intention. If the intention to deviate is joined with, and merely supplementary to, the intention to perform the voyage covered by the insurance, there is no deviation and the policy attaches. There is an important distinction between a change of risk after the voyage is begun and the substitution of a different voyage. In the latter case, the policy does not attach. Doubt can arise only when the course of the two voyages is the same for a portion of the distance. In these cases, it is material to ascertain the terminus of the voyage for which the vessel clears, and if a different terminus is clearly proved, this in general makes the voyage a different one and the policy never attaches. *Forbes v. Church*, 3 Johns. Cas. N. Y. 159; *Merrill v. Boylston Ins. Co.*, 3 All. Mass. 247.

³⁰ *Marshall, Ins.* 185.

³¹ *Campbell v. Williamson*, 2 Bay So. C. 237; *Delany v. Stoddart*, 1 Term, 22.

³² *Turner v. Protection Ins. Co.*, 25 Me. 515.

³³ *Hall v. Franklin Ins. Co.*, 9 Pick. Mass. 466.

forming it. But a distinction has been made between a delay to save lives which are in jeopardy and such a delay to save property. The former is justifiable, the latter is a deviation.³⁴

The vessel may depart from her course to avoid the perils insured against; and this will cover cases where such a departure is necessary for the safety of the lives and property on board, as to avoid capture or detention.³⁵

So, where the policy covers only some of the perils of the sea, the vessel may depart from the course for any cause which would be justifiable under a policy against the perils of the sea generally.³⁶

But the captain must not undertake a new and distinct adventure on account of some obstacle not insured against.³⁷

The inability of the captain or crew to navigate the ship in safety, whether such inability arise from sickness, death, or other cause, so as to render it highly perilous or impossible to proceed on the voyage, will justify a deviation for the purpose of obtaining medical assistance or other hands. In this case, however, it must appear that this inability did not arise from the neglect or mismanagement of the owners or the master.³⁸

The mutiny of the crew, when the captain departs from his course by compulsion, will be a justification for his deviation. A departure in this case is as much a matter of necessity as if the vessel had been forced by the wind and the waves.

1190. When an underwriter undertakes to insure against certain losses, his contract is definite and distinct; he engages to insure no other than the voyage described in the policy. If the insured or his agent, without necessity, depart from the voyage which is the object of the contract, it is no longer the same voyage, and if a loss occur, the insurer cannot be made responsible for it, because he never insured for the voyage in which it happened.³⁹

1191. *The effect of the deviation* is not to vitiate or avoid the policy; it simply determines or puts an end to the liability of the underwriters from the time of the deviation. When, therefore, a loss occurs before any deviation has taken place, although the insurer will be discharged from all responsibility for loss which may take place after the deviation, yet he will be liable for the loss sustained before.⁴⁰

1192. Though the insurer will be discharged from all liability when there has been an unnecessary deviation, he will be entitled to retain the whole premium. The insurer is discharged from his liability when there has been a deviation not warranted by necessity, not because the risk is increased, but because the insured has, without necessity, substituted another voyage for that which was insured, and thereby varied the risk. The extent of the change is altogether unimportant; the slightest unauthorized deviation changes the voyage.⁴¹

³⁴ *The Boston*, 1 Sumn. C. C. 328; *The Henry Ewbank*, 1 Sumn. C. C. 400; *Little v. St. Louis Perpetual Ins. Co.*, 7 Mo. 379; *Box of Bullion*, 1 Sprague, Dist. Ct. 57; *Crocker v. Jackson*, 1 Sprague, Dist. Ct. 141.

³⁵ *Oliver v. Maryland Ins. Co.*, 7 Cranch, 487.

³⁶ *Riggen v. Patapasco Ins. Co.*, 7 Harr. & J. Md. 279; *Robinson v. Marine Ins. Co.*, 2 Johns. N. Y. 89.

³⁷ *Lee v. Gray*, 7 Mass. 349; *Kettell v. Wiggin*, 13 Mass. 68; *Robertson v. Columbian Ins. Co.*, 8 Johns. N. Y. 491.

³⁸ *Williams v. Smith*, 2 Caines, N. Y. 1; *Cruder v. Philadelphia Ins. Co.*, 2 Wash. C. C. 262; *Cruder v. Pennsylvania Ins. Co.*, 2 Wash. C. C. 339; *Winthrop v. Union Ins. Co.*, 2 Wash. C. C. 7.

³⁹ *Merchants' Ins. Co. v. Algeo*, 32 Penn. St. 330.

⁴⁰ *Coffin v. Newburyport Ins. Co.*, 9 Mass. 449.

⁴¹ *Natchez Ins. Co. v. Stanton*, 10 Miss. 340; *Martin v. Delaware Ins. Co.*, 2 Wash. C. C. 254.

1193. When there has been a deviation, and, before any sinister accident has occurred, the vessel returns to her track and pursues her course, and then she encounters perils and is lost, the insurer is not responsible; and this is so for several reasons: first, because by the unnecessary deviation, the implied condition on the part of the insured that the vessel should pursue her course, there has been a violation of the contract, and, being once broken by him, it cannot be renewed without the consent of the insurer; secondly, it cannot be known to a certainty that the risk has not been increased. If the vessel had not deviated from her course, she would not have been where she was when the loss occurred, and she might have escaped the danger altogether.

1194. Maritime *risks* are perils which are incident to a sea-voyage,⁴² or those fortuitous events which may happen in the course of the voyage.⁴³ It will be proper to inquire into the nature of the risk usually insured against, and its duration.

1195. The risks usually insured against are perils of the seas, fire, piracy and theft, barratry, capture, arrests, and detentions.

Perils of the seas include in general all losses arising from the elements and inevitable accidents, as shipwreck, jettison.⁴⁴ It does not cover the ordinary wear and tear of the vessel, but only extraordinary losses.⁴⁵

Damage by collision is covered, by whichever vessel caused,⁴⁶ but if the assured is liable to the other vessel, he cannot recover the amount paid from the underwriters.⁴⁷

Barratry is a fraudulent act of the master or mariners contrary to their duty to the owner and prejudicial to his interests.

Insurance covers only the direct effects of a peril, and not its remote consequential effects.

1196. The law, founded on reason and public policy, has made some exceptions, which require that in certain cases men shall not be permitted to protect themselves against some particular perils by insurance; among these exceptions are the following:

No man can insure against any loss or damage proceeding directly from his own fault.⁴⁸

He cannot insure against risks or perils of the sea upon a trade forbidden by the laws.

Policies usually make express exceptions of certain risks, such as contraband trade, seizure, detention, etc. In river policies, loss by bursting of boilers or breaking of engines is frequently excepted.

1197. As the insurance is upon maritime risks, the accidents must have happened on the sea, unless the policy includes other risks. The loss by accidents which happen on land in the course of the voyage, even when the unloading may have been authorized by the policy, or is required by local regulations, as where they are necessary for sanitary measures, is not borne by the insurer.

⁴² Marshall, *Ins.* 215.

⁴³ Pothier, *Contr. d'Assur.* n. 49; Pardessus, *Dr. Com.* n. 770.

⁴⁴ Marshall, *Ins.* 487; Phillips, *Ins.* No. 1099; The *Reeside*, 2 Sumn. C. C. 567; *Perrin v. Protection Ins. Co.*, 11 Ohio, St. 147; *Citizens' Ins. Co. v. Glasgow*, 9 Mo. 406.

⁴⁵ Magens, Chap. 1, p. 52, s. 51; Stevens, *Av. c.* 3; Benecke & S. 366.

⁴⁶ *Peters v. Warren Ins. Co.*, 1 Stor. C. C. 463, 3 Sumn. C. C. 389, 14 Pet. 99.

⁴⁷ Phillips, *Ins.* Nos. 1137, a, 1416-1419; *Walker v. Boston Ins. Co.*, 14 Gray, Mass. 288.

⁴⁸ Marshall, *Ins.* 215; Pothier, n. 65; Pardessus, n. 771; *Thompson v. Hopper*, 6 Ell. & B. 172; *Amicable Society v. Bolland*, 2 Dow & C. Hou. L. 1. But the underwriter is liable for losses caused by the negligence of the assured, if it does not amount to wilful misconduct. *Johnson v. Berkshire Ins. Co.*, 4 All. Mass. 388; and it seems that the policy may cover losses from the negligence and even the fraud and misconduct of the agents of the assured. *Andrews v. Essex Mar. Ins. Co.*, 3 Mas. C. C. 6; *Fireman's Ins. Co. v. Powell*, 13 B. Monr. Ky. 311.

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1198. *The commencement and the end of the risk* depend upon the words of the policy. The insurer may take and modify what risks he pleases. The policy may be on a voyage out or a voyage in, or it may be on part of the route, or for a limited time, or from port to port.

The policy is usually for a voyage, and either "from" or "at and from" the port of departure. In the first case the risk begins at the time of the vessel's sailing; that is, when she breaks ground and weighs anchor with the intention of leaving on the voyage.⁴⁹

Under a policy "at and from" a foreign port, the risk commences when she is safely there.

Insurance on the cargo usually begins on the loading, and attaches to each parcel as it is loaded.

The voyage is ended when the vessel is moored at the ordinary anchorage-ground, and the port of destination includes its usual outports.

1199. We have seen that to make a valid insurance there must be a consideration or premium paid by the insured. The *premium* is so called because it is to be paid before the contract shall take effect.⁵⁰ But the premium is not always paid when the policy is underwritten, for insurances are frequently effected by brokers, and open accounts are kept between them and the underwriters, in which they make themselves debtors for all premiums; and sometimes notes or bills are given for the amount of the premium.

It is a rule that if the policy has never attached, the insurer has no claim for the premium; but if once it attaches, and he runs any risk, he is entitled to it.⁵¹

1200. The contract of insurance is in general made in the same form which has been established by the wisdom and experience of ages; no deviation from it ought to be allowed under any pretext, as all the terms therein adopted have received the deliberate sanction of the courts.⁵² Let us inquire into the general requisites of a policy; into its several parts; and their different kinds.

1201. In Europe most of the codes prescribe that a policy of insurance must be in writing, but this is not required by the common law, and a parol insurance is valid,⁵³ subject, of course, like other contracts, to statute provisions, such especially as stamp laws and the statute of frauds.⁵⁴

1202. The *particular requisites of a policy* are numerous. They will be here considered in their order.

1203. *The parties.* The policy should state the name of the insurer and the name of the insured; but it may be taken in the name of a party, and "for whom it may concern;"⁵⁵ or in the name of A and —, when it will be considered as if taken for whom it may concern.⁵⁶

1204. *The name of the ship.* When an insurance is made on the ship it must necessarily identify the vessel which it is meant to insure; this is done by naming the vessel. When the insurance is on goods, it is usual and requisite to specify in the policy the ship in which they are to be transported, together with the name of the captain. This is necessary because all ships are not equally

⁴⁹ *Bowen v. Hope Ins. Co.*, 20 Pick. Mass. 275.

⁵⁰ *Pothier*, n. 81; *Marshall*, Ins. 234.

⁵¹ *Cleveland v. Fettyplace*, 3 Mass. 392; *Merchants' Ins. Co. v. Clapp*, 11 Pick. Mass. 56.

⁵² *Marshall*, Ins. 304, 5.

⁵³ *Trustees v. Brooklyn F. Ins. Co.*, 19 N. Y. 305; *Mobile Ins. Co. v. McMillan*, 31 Ala. n. s. 711; *Wood v. Rutland Ins. Co.*, 31 Vt. 552; *contra*, *Cockerill v. Cincinnati Ins. Co.*, 16 Ohio, 148; *Walden v. Louisiana Ins. Co.*, 12 La. 135.

⁵⁴ The effect of the United States Revenue Laws in this respect is discussed in *Western Mass. Ins. Co. v. Duffey*, 2 Kans. 347.

⁵⁵ *Flemming v. Marine Ins. Co.*, 4 Whart. Penn. 59; *De Bolle v. Penn. Ins. Co.*, 4 Whart. Penn. 68.

⁵⁶ *Burrows v. Turner*, 24 Wend. N. Y. 276.

good, and the insurer by this means can alone form a correct judgment. It is evident that if one ship be named in the policy, and the goods be sent in another, the policy will not cover them.⁵⁷ To prevent loss by any such mistake it is usual to insert in every policy these words: "or by whatever other name or names the same ship, or the master thereof, is, or shall be, named or called;" so that if the identity of the ship can be proved, and no fraud be meant, a mistake in the name of the ship will not vitiate the contract.

1205. *The description of the voyage.* The voyage insured must be accurately described in the policy, namely, the time and place at which the risk is to begin, the place of the ship's departure, the place of her destination, and the time when the risk shall end, whether on the goods or on the ship.⁵⁸

The policy should state the place where the merchandise has been or is to be loaded; but this rule is modified when the policy is on a voyage from abroad, for it may be good though it omit the name of the ship, or master, or port of discharge, or consignee, or to specify or designate the nature or species of the cargo, for all these may be unknown to the insured when he applies for the insurance.⁵⁹ But the cargo must be of the same species as that described in the policy.

In general, the port of destination ought to be mentioned, but sometimes the voyage is described merely as to time, as for three months; in that case the place of destination, if required at all, is only to identify the vessel, and to give to the insurer a clearer notion of the risks he has to run.

The policy should mention all the ports, harbors, and havens where the ship may enter and load or unload, either expressly or by sufficient designation.

1206. *The subject matter of the insurance.* The policy must specify the subject matter of the insurance, whether it be goods, ship, freight, respondentia or bottomry, securities, or whatever it may be.

When a ship is the object of the insurance, and not merely the place where the risks occur, as where goods on a certain ship are insured, the name must be correctly mentioned in the policy for the purpose of indicating the vessel and to prevent fraud. What we have before mentioned with regard to a mistake in the name of the ship, when it is merely designated a place where the things at risk are to be placed, does not apply when the policy is on the ship itself.⁶⁰

When goods are the subject matter of the insurance, it is not necessary to designate the different sorts. It is usually expressed to be "upon any kind of goods or merchandise."

1207. *The perils insured against.* The perils against which the insured means to be protected must be distinctly enumerated in the policy. By the usual form, these extend over nearly all that can happen which are insurable, but there are some, as we have seen, against which there can be no insurance.

If the policies contain the words, "lost or not lost," the insurer not only undertakes by this to insure against future losses, but against those which have already accrued.

1208. *The clause giving powers to the insured in case of misfortunes.* To remove a doubt which formerly existed, a clause is introduced into the policy to authorize the insured to take all necessary care of property in case of misfortunes, without prejudice to the insurance.

1209. *Promise of the insurers and receipt of the premium.* The next clause in the policy is that in which the insurers bind themselves to the insured for

⁵⁷ Marshall, Ins. 313.

⁵⁸ Marshall, Ins. 231.

⁵⁹ 3 Boulay Paty, 412; Pardessus, Dr. Com. n. 805, 809; 3 Kent, Comm. 259.

⁶⁰ Pardessus, n. 811.

the performance of their contract, and confess themselves paid the consideration or premium by the insured, at the rate specified.

1210. *The common memorandum.* This is introduced for the purpose of relieving the insurer from any liability whatever as to some specified articles; and, of others, making him not responsible, unless the loss exceeds three, and others five, per centum, and then only for the excess.

1211. *The date and subscription.* The sum insured is, in general, placed in the subscription after the signature, in the underwriter's handwriting and in words at length, and not in figures.

The policy should be dated; it is usual for each underwriter to date it immediately after his name, so that a policy may have several dates.

1212. A *warranty* is a stipulation or agreement on the part of the insured, in the nature of a condition precedent. It may be affirmative; for example, where the insured undertakes for the truth of some positive allegation, as that the thing insured is neutral property, that the ship is of such a force, that she has sailed, and the like; or it may be promissory; for example, where the insured undertakes to perform some executory stipulations; as, that the ship shall sail by a given day, that she shall depart with convoy, etc.

Warranties are also either express or implied. The former are introduced in the written contract of the parties; as, that the ship is neutral property. An implied warranty is that which necessarily results from the nature of the contract; as, that the ship is sea-worthy, that she shall be navigated with reasonable skill and care, that the voyage is lawful and shall be performed according to law, in the usual course, without any deviation, etc.

1213. A *representation*, in insurance, is a collateral statement, either in writing, not inserted in the policy, or by parol, of such facts or circumstances relative to the purposed adventure as are necessary to be communicated to the underwriters to enable them to form a just estimate of the risk. Representations must be exactly true, for, as we have already observed, the contract of insurance requires the most perfect fairness.⁶¹

A representation, like a warranty, may be either affirmative; as, where the insurer avers the existence of some fact which may affect the risk; or promissory, as when he engages for the performance of something executory.⁶²

There is a material difference between a representation and a warranty. A warranty, being a condition upon which the contract is to take effect, is always a part of the written policy, and must appear on its face;⁶³ whereas a repre-

⁶¹ When the insured, in a case of fire insurance, made an offer for insurance in these words: "What premium will you ask to insure the following property belonging to L. & P. for one year against loss or damage by fire? On their stone mill four stories high, covered with wood, on an island about one mile from Fredericksburg, in the county of Stafford, the mill called Elba mill. Seven thousand are wanted. Not within thirty yards of any other building, except a corn-house, which is about twenty yards off." The policy which was made in consequence of this offer states that the underwriters insure L. & P. against loss or damage by fire, to the amount of seven thousand dollars on their mill, etc. On a suit on this policy, it appeared that, instead of such an estate in the property as the representation justified the insurers in expecting, the plaintiffs held only one-half of one-third, under a lease for three lives, renewable for ever, and one-half of the other two-thirds as mortgagees; that the other moiety was held under a contract, the terms of which had not been complied with; and which, if complied with, would give them a title to two-thirds as mortgagees. It was held that the representation did not truly state the interest the insured had in the property. *Columbian Ins. Company v. Lawrence*, 2 Pet. 25, 47, 49.

⁶² It has been made a question whether a promissory representation was obligatory, but the principle stated in the text has been repeatedly sustained. *Clark v. Manufacturers' Ins. Co.*, 8 How. 235; *Williams v. N. E. Ins. Co.*, 31 Me. 219; *Underhill v. Agawam Ins. Co.*, 6 Cush. Mass. 440; *Sillem v. Thornton*, 3 Ell. & B. 868; 2 Duer, Mar. Ins. 657; *Phillips*, Ins. No. 553.

⁶³ *Marshall*, Ins. c. 9, § 2.

sentation is only a matter of collateral information or intelligence on the subject of the voyage insured, and makes no part of the policy. Again, a warranty, being in the nature of a condition precedent, must be strictly and literally complied with; but it is sufficient if the representation be true in substance. Whether a warranty be material to the risk or not, the insured stakes his claim to indemnity upon its precise truth, if it be affirmative, or upon the exact performance of it, if executory. But if a representation be made without fraud, and be not false in any material point, or if it be substantially, though not literally fulfilled, it is sufficient. A false warranty avoids the policy, as being a breach of the condition upon which the contract is to take effect, and the insurer is not liable for any loss, though it do not happen in consequence of the breach of the warranty; a false representation is no breach of the contract, but, if material, avoids the policy on the ground of fraud, or at least because the insurer has been misled by it.

1214. A *concealment* in insurance is the unlawful suppression of any fact or circumstance which the insured is bound to disclose to the insurer. This, like any other fraud, avoids the contract *ab initio*, upon principles of natural justice.

It does not matter whether the concealment be intentional or the mere effect of negligence, accident, inadvertence, or mistake; if material, it is equally fatal to the contract as if it were intentional and fraudulent.

The insured is required to disclose all the circumstances which are within his own knowledge only, and which increase the risk. A neglect to do this will avoid the policy; as, where the concealment was that the assured had heard that a vessel like his was taken.⁶⁴ And in a case where the assured had information of "a violent storm," about eleven hours after his vessel had sailed, and represented there "had been blowing weather and severe storms on the coast after the vessel had sailed," but without any reference to the particular storm, it was held that this was such a concealment as violated the policy.⁶⁵

But although the insured is thus bound to disclose all he knows, he is not required to state general circumstances which apply to all policies of a particular description, notwithstanding they may greatly increase the risk.⁶⁶

1215. A *loss* in insurance is the injury or damage sustained by the insured in consequence of the happening of one or more of the accidents or misfortunes against which the insurer, in consideration of the premium, has undertaken to indemnify the insured.

These accidents or misfortunes, or perils, as they are usually denominated, are all distinctly enumerated in the policy. These are: "Touching the adventures and perils which we the assurers are contented to bear and take upon us in this voyage, they are of the seas, men-of-war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and counter-mart, surprisals, taking at sea, arrests, restraints and detentions of all kings, princes, and people, of what nation, condition, or quality soever, barratry of the master and mariners; and of all other perils, losses and misfortunes, that have or shall come to the hurt, detriment, or damage of the said goods and merchandise, and ship, etc., or any part thereof, without prejudice to this insurance." No loss, however great or

⁶⁴ 1 W. Blackst. 594; 3 Burr. 1909.

⁶⁵ Ely v. Hallett, 2 Caines, N. Y. 57.

⁶⁶ The general rule is that the assured need not disclose facts known to those conversant with the trade, and which the underwriter has equal opportunities of learning, but must disclose all material facts which lie commonly in his own knowledge only. Whether the disclosure would affect the rate of premium is a useful though not infallible criterion to ascertain their materiality.

unforeseen, can be a loss within the policy, unless it be the direct and immediate consequence of one or more of these perils.⁶⁷

It is a matter of great difficulty to say what damage is the direct consequence of the peril. As the assured must take steps to avert or diminish the loss, the underwriters are responsible for damage caused thereby; as, where in case of fire the goods are wet by the water used to extinguish it,⁶⁸ so the expense necessarily incurred is a part of the loss.⁶⁹

It may happen that damage is caused during the period covered by the policy, but the loss may not happen or the full effects of the damage may not be manifested until the policy has expired. In such cases the liability of the underwriters is determined by the condition of the vessel at the expiration of the policy, and if a total loss is the inevitable consequence of its condition at that time, it is a total loss under the policy.⁷⁰

Where two causes concur to produce the loss, it must be attributed to the efficient predominating cause, whether it is actually in operation at the time of the loss or not.⁷¹

1216. An *absolute total loss* happens when the subject of the insurance is entirely destroyed, or so much injured as to be of no value to the assured for its intended uses, or is taken from his control. A *constructive total loss* takes place when the subject ceases to be of material value to the assured, although some portion thereof or some claim against third persons arising out of the injury thereto remains.

There is a constructive total loss when the ship, for all useful purposes of the voyage, is gone from the owner's control, and the time when she will be restored to him in a state to resume the voyage is uncertain or unreasonably distant, or the risk and expense are disproportioned to the expected benefit from the voyage.⁷²

In the United States a constructive total loss happens when the subject insured is damaged more than half its value.⁷³

1217. A *partial loss* is any damage short of, or not amounting to, a total loss; for if it be not the latter, it must be the former. Partial losses are sometimes denominated average losses, because they are often in the nature of those losses which are the subject of average contributions, and they are distinguished into general and particular averages.

1218. Losses are occasioned in a variety of ways, but most usually in the following:

By perils of the sea. This is the generic name for all those losses which arise from natural accidents peculiar to the sea, but in more than one instance they have been held to extend to events not attributable to natural causes.⁷⁴

By collision, which takes place when two vessels run foul of each other, or when one runs foul of the other. In all cases, collision, when there is no fault

⁶⁷ Marshall, Ins. B. 1, c. 12.

⁶⁸ Magoun v. New England Mar. Ins. Co., 1 Stor. C. C. 157.

⁶⁹ 1 Magens, p. 76, s. 64; Dix v. Union Ins. Co., 23 Mo. 57.

⁷⁰ Coit v. Smith, 3 Johns. Cas. N. Y. 16; Howell v. Protection Ins. Co., 7 Ohio, 284; Roche v. Thompson, Millar, Ins. 20.

⁷¹ Phillips, Ins. No. 1132; Thompson v. Hopper, 1 Ell. B. & E. 1038; 6 Ell. & B. 937; Tudor v. New England Ins. Co., 12 Cush. Mass. 554.

⁷² Peele v. Merchants' Ins. Co., 3 Mas. C. C. 65; Rhinelander v. Ins. Co., 4 Cranch, 41; Marshall v. Delaware Ins. Co., 4 Cranch, 207; Wood v. Lincoln Ins. Co., 6 Mass. 479.

⁷³ Fontaine v. Phoenix Ins. Co., 11 Johns. N. Y. 293; Byrne v. La. State Ins. Co., 12 Mart. N. S. La. 126; Bullard v. Roger Williams Ins. Co., 1 Curt. C. C. 148.

⁷⁴ Garrigues v. Cox, 1 Binn. Penn. 592; 3 Kent, Comm. 300, 4th ed.

on either side, is deemed a peril of the sea within the meaning of the policy of insurance.⁷⁵

By fire. The insurer is liable for the loss of a vessel by fire, though it may have been occasioned by the negligence of the master and crew.⁷⁶

By capture, which is the taking of property by one belligerent from another according to the laws and usages of war.

By detention of princes. By the terms of the policy the insurer is liable for all loss occasioned by "arrest or detentions of all kings, princes, and people, of what nation, condition, or quality soever."⁷⁷

By barratry, which is the act of the master or mariners, committed with fraudulent intent, contrary to their duty as such, to the prejudice of the owners of the ship.⁷⁸

By average and contribution. Average is a term used in commerce to signify a contribution made by the owners of the ship, freight, or goods on board, in proportion to their respective interests, toward any particular loss or expense sustained for the general safety of the ship and cargo, to the end that the particular loser may not be a greater sufferer than the owner of the ship and the other owners of the goods on board.⁷⁹

By salvage. Salvage loss is understood to be the difference between the amount of salvage after deducting the charges and the original value of the property.⁸⁰

By the death of animals. If animals, such as horses, cattle, or beasts or birds of curiosity, be insured in their passage by sea, their death, occasioned by tempests, by the shot of an enemy, by jettison in a storm, or by any extraordinary accident occasioned by the perils enumerated in the policy, is a loss for which the underwriters are liable. Not so if it be occasioned by mere disease or natural death.

By piracy. By this term is understood a robbery or forcible depredation on the high seas without lawful authority, done *animo furandi*, in the spirit and intention of universal hostility.⁸¹ A capture by pirates is a loss within the policy.

1219. An *abandonment* in insurance is the act by which the insured relinquishes to the insurer all the property to the thing insured. When the property insured has been lost, or so deteriorated that it cannot be used by the owner to advantage, he may in many cases abandon the property to the insurer, and look to him as for a total loss.

The assured may always elect whether to abandon or not; he is never obliged to abandon.

An absolute total loss is not affected in any way by abandonment. The assured cannot recover a constructive total loss unless he makes an abandonment.

An abandonment must be prompt,⁸² absolute in its terms,⁸³ not conditional, and must state the grounds upon which it is made.⁸⁴

⁷⁵ Hale v. Wash. Ins. Co., 2 Stor. C. C. 176; Peters v. The Warren Ins. Co., 3 Sumn. C. C. 389; 14 Pet. 99.

⁷⁶ Waters v. Merchants' Ins. Co., 11 Pet. 213.

⁷⁷ Marshall, Ins. B. 1, c. 12, s. 5.

⁷⁸ Emerigon, Ins. tom. 1, p. 366; Merlin. Rép.; Roccus; Abbott, Shipp. 167, n. 1; Crou-sillat v. Ball, 4 Dall. 294.

⁷⁹ Marshall, Ins. B. 1, c. 12, s. 7.

⁸⁰ Stevens, Av. c. 2, s. 1.

⁸¹ United States v. Smith, 5 Wheat. 153; United States v. Pirates, 5 Wheat. 184; United States v. Tully, 1 Gall. C. C. 247; United States v. Jones, 3 Wash. C. C. 209.

⁸² Livermore v. Newburyport Ins. Co., 1 Mass. 264; Smith v. Newburyport Ins. Co., 4 Mass. 668; Bell v. Beveridge, 4 Dall. 272.

⁸³ Fuller v. McCall, 1 Yeates, Penn. 464; Fireman's Ins. Co. v. Powell, 13 B. Monr. Ky. 311. So in France, Code de Commerce, l. 2, tit. 10, s. 3, a. 183.

⁸⁴ Allen v. Commercial Ins. Co., 1 Gray, Mass. 154; McConochie v. Sun Mutual Ins. Co., 26 N. Y. 477.

1220. The assured may abandon in all cases of total loss, absolute or constructive. If the event prove a total loss, of course the abandonment is justified. But if the facts existing at the time upon which the assured abandons constitute a constructive total loss, the abandonment is effectual, though subsequent events change the loss to partial. Such a case arises upon abandonment for capture and subsequent recapture. But in all cases the criterion by which the efficacy of an abandonment is tested are the facts at the time of abandonment,⁸⁵ though in England the test is the state of facts when the action for loss is commenced.⁸⁶

An abandonment once made cannot be revoked without the consent of the underwriters.⁸⁷

It is usual for the underwriters to accept or decline the abandonment; an acceptance admits the right to abandon and the validity of a claim for a total loss.⁸⁸

1221. The effect of an abandonment is to render the underwriter liable for the full amount insured, and to transfer to him the title to the subject from the date of the loss.⁸⁹

Up to this date the owner is entitled to the earnings of the ship and to the benefit of all claims of the ship against third parties. He is entitled to *pro rata* freight if actually earned, though not due and payable until the completion of the voyage.⁹⁰ He must consequently transfer the salvage to the underwriter free from all claims and liens for seamen's wages or otherwise.⁹¹

After the date of the loss the underwriter is vested with all the privileges and subjected to all the liabilities of ownership. He is entitled to the earnings of the ship from this time, and to all claims against third parties connected with the loss.⁹² He is liable for claims incurred in rescuing the vessel from the peril causing the loss, and for all debts incurred by the vessel after the loss.

1222. When a loss has occurred, the amount must be ascertained so that a settlement may be made; this is done by an adjustment. The *adjustment* of a loss is the settling and ascertaining the amount of the indemnity which the insured, after making all proper allowances, is entitled to receive, and the proportion of this which each underwriter is liable to pay under the policy, or it is the amount of the losses as settled between the parties to a policy of insurance.

1223. The first thing to be considered is the quantity of damages for which the underwriters are liable. When the loss is total and the policy is a valued one, the insured is entitled to receive the whole sum insured, subject to such deductions as may have been agreed upon by the policy to be made in case of loss.⁹³

1224. The quantity of damages being known, the next point to be settled is, by what rule this shall be appreciated. The price of a thing does not afford a

⁸⁵ Bainbridge v. Neilson, 10 East, 329; Smith v. Robertson, 2 Dow, Parl. Cas. 474; Marshall v. Delaware Ins. Co., 4 Cranch, 202; Schieffelin v. New York Ins. Co., 9 Johns. N. Y. 21; Nonton v. Lexington Ins. Co., 16 Ill. 235; Adams v. Delaware Ins. Co., 3 Binn. Penn. 287; Dorr v. New England Ins. Co., 4 Mass. 421.

⁸⁶ Naylor v. Taylor, 9 Barnew. & C. 718.

⁸⁷ King v. Middleton Ins. Co., 1 Conn. 184.

⁸⁸ Cincinnati Ins. Co. v. Bakewell, 4 B. Monr. Ky. 541.

⁸⁹ Mutual Safety Ins. Co. v. Cargo of the George, Olc. Dist. Ct. 89; Coolidge v. Gloucester Mar. Ins. Co., 15 Mass. 341; Schieffelin v. New York Ins. Co., 9 Johns. N. Y. 21.

⁹⁰ Marine Ins. Co. v. United Ins. Co., 9 Johns. N. Y. 190; Simonds v. Union Ins. Co., 1 Wash. C. C. 443; Peters v. Phoenix Ins. Co., 3 Serg. & R. Penn. 25; Kennedy v. Baltimore Ins. Co., 3 Harr. & J. Md. 367; Teasdale v. Charleston Ins. Co., 2 Brev. So. C. 190.

⁹¹ Williams v. Smith, 2 Caines, N. Y. 13; Coffin v. Storer, 5 Mass. 251.

⁹² Lorillard v. Palmer, 15 Johns. N. Y. 14; Palmer v. Lorillard, 16 Johns. N. Y. 348.

⁹³ Kane v. Com. Ins. Co., 8 Johns. N. Y. 229.

just criterion to ascertain its true value. It may have been bought very dear or very cheap. The circumstances of time and place cause a continual variation in the price of things. For this reason, in cases of general average the things saved contribute, not according to prime cost, but according to the price for which they may be sold at the time of settling the average.⁹⁴

1225. The effect of an adjustment is to fix *prima facie* what is due by the insurer to the insured.⁹⁵

1226. When considered with regard to the interest insured, policies are distinguished into interest and wager policies; when with the amount of interest, into open and valued.

1227. An *interest policy* is where the insured has a real, substantial, assignable interest in the thing insured, in which case only it is a contract of indemnity. This interest may consist in the ship, goods, freight, and such-like valuable things.

1228. A *wager policy* is a pretended insurance, founded on an ideal risk, where the insured has no interest in the thing insured, and can therefore sustain no loss by the happening of any of the misfortunes insured against. These policies are unlawful.

1229. An *open policy* is where the amount of the interest of the insured is not fixed by the policy, but is left to be ascertained in case of loss.

1230. A *valued policy* is where a value has been set on the ship or goods insured, and this value has been inserted in the policy in the nature of liquidated damages to save the necessity of proving it in case of loss.

1231. *The insurance of the life of a person* is a contract by which the insurer, in consideration of a certain premium, either in a gross sum or periodical payments, undertakes to pay the person for whose benefit the insurance is made a stipulated sum, or annuity equivalent, upon the death of the person whose life is insured, whenever this shall happen, if the insurance be for the whole life, or in case this shall happen within a certain period, if the insurance be for a limited time.

The principal points deserving examination are the interest, the warranty, the risk, and the settling of the loss.

1232. A man may insure his life for the benefit of his heirs and creditors, or of any one dependent on him.⁹⁶ A man may also insure the life of any third person upon whom he is dependent,⁹⁷ or by whose death he would suffer a direct pecuniary loss. Thus a creditor may insure his debtor,⁹⁸ a partner his co-partner,⁹⁹ a wife her husband, a father his minor child.¹⁰⁰

It is sufficient if the interest exists at the execution of the policy; it may cease before the loss happens, but the underwriters are liable all the same.¹⁰¹ The policy may be assigned to any one having an interest or not in the life insured, and will inure to such assignee.¹⁰²

The amount payable depends on the sum in the policy, and not at all on the actual pecuniary interest in the life.¹⁰³

⁹⁴ *Snell v. Ins. Co.*, 4 Dall. 430. See *Suydam v. Marine Ins. Co.*, 2 Johns. N. Y. 138; *Lawrence v. New York Ins. Co.*, 3 Johns. Cas. N. Y. 217.

⁹⁵ *Facier v. Hallett*, 2 Johns., Cas. N. Y. 233.

⁹⁶ *Lord v. Dall*, 12 Mass. 115.

⁹⁷ *Holford v. Kymer*, 10 Barnew. & C. 724; *Ruse v. Mutual Ins. Co.*, 23 N. Y. 516.

⁹⁸ *Rawls v. American Ins. Co.*, 27 N. Y. 282; *Morrell v. Trenton Ins. Co.*, 10 Cush. Mass. 282.

⁹⁹ *Valton v. National Ass. Soc.*, 22 Barb. N. Y. 9, 20 N. Y. 32.

¹⁰⁰ *Loomis v. Eagle Ins. Co.*, 6 Gray, Mass. 396; *Mitchell v. Union Ins. Co.*, 45 Me. 104.

¹⁰¹ *Dalby v. India Ins. Co.*, 15 C. B. 365, overruling *Godsall v. Boldero*, 9 East, 72.

¹⁰² *Trenton Ins. Co. v. Johnson*, 4 Zab. N. J. 576.

¹⁰³ *Bevin v. Connecticut Ins. Co.*, 23 Conn. 244; *Hoyt v. New York Ins. Co.*, 3 Bosw. N. Y. 440.

1233. Insurance on lives is usually, if not invariably, made on the basis of written answers to written questions, which form a part of the "application" for insurance; and the statements of the assured are usually mentioned in the policy as warranties, and so construed; and a policy will be avoided by a false answer, whether material to the risk or not.¹⁰⁴ The assured is also usually asked to state all other circumstances affecting the duration of his life. In answer to this he need only state material facts, but a false statement of an immaterial fact avoids the policy.¹⁰⁵

The application usually contains questions to be answered by a physician as to the life insured. These answers, as also the answers of the person whose life is insured by another, are not warranties unless expressly made so, but if they are false fraudulently as to material facts, or if they are false as to material facts without fraud, and are known to be false by the policy holder, then the policy is void.¹⁰⁶

1234. Life policies usually contain stipulations that the life insured shall not go beyond certain territorial limits, either at all, or during certain seasons; and shall not enter the military or naval service; and provide that the sum insured shall not be paid if he shall die upon the seas; or by suicide, or by his own hands; or by the hands of justice, or in violation of law; or in a duel.

The stipulation as to limits is usually waived on payment of an increased premium, and consent indorsed in the policy.

Suicide, or death by his own hands, includes all cases of self-destruction where the assured, whether insane or not, knew the consequences of the act he was committing, though he could not distinguish between right and wrong. That is, it includes all voluntary or intentional self-destruction.¹⁰⁷

The exceptions of suicide, duelling, and death by the hands of justice, are usually waived where the policy is issued to a third person as a creditor.

1235. Inasmuch as the loss must always be total, the full sum insured must be paid. It is to be observed that, unless the death occurs during the time for which the insurance was effected, the insurer will not be responsible, although the death wound may have been received during that period.

1236. The next kind of hazardous contracts is *insurance against loss occasioned by fire*. This is a contract by which the insurer, in consideration of a certain premium received by him, either in a gross sum or by annual payments, undertakes to indemnify the insured against all loss or damage which he may sustain to a certain amount, in his house or other building, stock, goods, or merchandise mentioned in the policy, by fire, during the time agreed upon.

The principal points deserving examination are: the interest; the nature of the loss insured against, or the risk; the warranties and representations; and the adjustment of the loss.

The principles of fire insurance are, in general, the same as those of marine insurance.

1237. It is obvious that the insured must have an *interest* in the thing insured; if it were otherwise, he would be tempted to set fire to the thing

¹⁰⁴ *Anderson v. Fitzgerald*, 4 Hou. L. Cas. 484; *Miles v. Connecticut L. Ins. Co.*, 3 Gray, Mass. 580.

¹⁰⁵ *Ellis, Life Ins.* 116; *Vose v. Eagle L. Ins. Co.*, 6 Cush. Mass. 42; *Hartman v. Keystone Ins. Co.*, 21 Penn. St. 466.

¹⁰⁶ *Rawls v. American L. Ins. Co.*, 27 N. Y. 282.

¹⁰⁷ *Dean v. American L. Ins. Co.*, 4 All. Mass. 96; *Borradaile v. Hunter*, 5 Mann. & G. 639, 5 C. B. N. s. 418; *Hartman v. Keystone Ins. Co.*, 21 Penn. St. 466. In *Breasted v. Farmers' Loan Soc.*, 8 N. Y. 299, it was held that an insane person, not being morally responsible, could not commit suicide within the meaning of this clause; but this case is against the weight of authority.

insured, and thereby not only cheat the insurer, but endanger the whole community. It is not, however, requisite that the insured should be the absolute owner of the thing insured; one who has a qualified property in it, as a bailee, or has an interest, as a creditor, may lawfully make an insurance, provided that the nature of the property be distinctly specified, and that all the insurances taken together upon the same property shall not exceed its full value.¹⁰⁸

1238. The *risks* and losses insured against are all losses or damage by fire during the term of the policy to the things insured. To recover for a loss by fire, there must be an actual fire or ignition. It is not sufficient that there has been an injurious increase of heat, while nothing has taken fire which ought not to be on fire.¹⁰⁹

1239. Generally, there is an exception in the policy of loss by fire caused by "invasion, insurrection, riot, civil commotion, or military or usurped power." "Civil commotion or usurped power" does not include the loss occasioned by a mere mob.¹¹⁰ And the exception of mobs and riot does not include a case where the property is burnt by the military authorities to prevent its use by a usurped power.¹¹¹

1240. The loss must be a loss within the policy; that is, within the time covered by the policy. It would seem that the insurance commences from the moment of paying the premium, although the policy be not delivered till some time afterward;¹¹² and that until the premium has been paid, there is no insurance, unless specially agreed upon.

1241. The insurers are liable, not only for loss by burning, but for all damages and injury, and reasonable charges attending the removal of articles, though never touched by the fire.¹¹³ And they will be equally responsible if the building insured has been blown up by order of the public authorities, to prevent the spread of the conflagration, if it would have been destroyed by fire.¹¹⁴

Insurers against fire are not liable for remote losses, but only for those which are immediate and direct.¹¹⁵

1242. In speaking of *warranties* and *representations* in cases of marine insurances, we have pointed out the difference between them. A warranty is a part of the contract, and whether material or not renders it void, if false. Warranties are not only express, but implied. The description of different classes of property, according to the risk, as contained in the proposals attached to the policy, form the subject of an implied warranty on the part of the in-

¹⁰⁸ See *Illinois Mutual Fire Ins. Co. v. Marseilles Man. Co.*, 6 Ill., 236; *Gilbert v. North Amer. Ins. Co.*, 23 Wend. N. Y. 43; *Catron v. Tennessee Ins. Co.*, 6 Humphr. Tenn. 176; *Col. Ins. Co. of Alexandria v. Lawrence*, 2 Pet. 25, 48.

¹⁰⁹ *Austin v. Drew*, 4 Campb. 360.

So where a house is struck by lightning, but not burnt, this is not a loss by "fire;" *Babcock v. Montgomery Ins. Co.*, 6 Barb. N. Y. 637; *Kenniston v. Merrimack Ins. Co.*, 14 N. H. 341. But a loss by the explosion of gunpowder, causing fire, is a loss by "fire;" *Scripture v. Lowell Ins. Co.*, 10 Cush. Mass. 356.

¹¹⁰ *Drinkwater v. London Ass. Co.*, 2 Wils. 363; *Langdale v. Mason, Marshall, Ins.* 2d ed. 791.

¹¹¹ *Harris v. York Ins. Co.*, 50 Penn. St. 341.

¹¹² *Lightbody v. North Amer. Ins. Co.*, 23 Wend. N. Y. 18; *Hamilton v. Lycoming Ins. Co.*, 5 Penn. St. 339.

¹¹³ *Hillier v. Alleghany Ins. Co.*, 3 Penn. St. 470; *Whitehurst v. Fayetteville Ins. Co.*, 6 Jones, No. C. 352. Thus the underwriters are liable for loss by plunder, while goods are being removed to save them from fire. *Case v. Hartford F. Ins. Co.*, 13 Ill. 676; *Independent Ins. Co. v. Agnew*, 34 Penn. St. 96; *Newmark v. Liverpool Ins. Co.*, 30 Mo. 160; *Witherell v. Maine Ins. Co.*, 49 Me. 200. See *Dowdeswell, L. & F. Ins.* 109.

¹¹⁴ *City F. Ins. Co. v. Corlies*, 21 Wend. N. Y. 367; *Phillips v. Protection Ins. Co.*, 14 Mo. 220.

¹¹⁵ *Hillier v. Alleghany Mutual Ins. Co.*, 3 Penn. St. 470.

sured; for when the property is given up as corresponding with the description of a particular class of property, and it truly does not so correspond, the policy is void.¹¹⁶

1243. The representation of facts must be true; a policy will be avoided either by *allegatio falsi* or *suppressio veri*.¹¹⁷ There must be the most perfect fairness in disclosing every circumstance material to the risk; but the concealment of a fact which could, in no event, increase the risk, will not avoid a policy.¹¹⁸ The insured should frankly disclose every reasonable grounds of apprehension which he may entertain.¹¹⁹

1244. The loss by fire is seldom a total loss, and the valuation in the policy is rather the fixing of a maximum, beyond which the underwriters are not to be liable, than the conclusive ascertainment of the value to be replaced. When a fire happens, there is an inquiry into the amount of the loss, the insured being bound to give the most satisfactory proof he can be expected to possess of the true amount of the injury.

We have seen that in marine policies, where there is a total loss, there is an abandonment of what may chance to be saved. A settlement of a loss by fire is made on the principles of a particular average, and the insurer is not entitled to the property which may happen to be saved.¹²⁰

Under a fire policy the assured recovers the whole amount of a loss if it does not exceed the amount insured, and this though it may be stipulated that the amount insured shall not exceed three-fourths of the value of the subject. It is sometimes stipulated that he shall recover the proportion of the loss which the whole loss bears to the whole value of the property. Where there are several policies the loss is usually divided in proportion to the amount insured by the several policies.

1244a. It is usually stipulated in fire policies that the assured shall give notice of the loss and furnish preliminary proofs of the amount.

The notice must be prompt,¹²¹ and must be given to the proper officer of the insurance company.¹²²

The preliminary proofs must include some schedule and estimate of value of the articles destroyed. Some other things are usually required as a certificate from the nearest magistrate.

1245. *Bottomry and respondentia*, sometimes denominated maritime loans, form another class of hazardous contracts. These are loans secured by a ship or cargo at a high rate of interest, the repayment being dependent on the safe arrival of the ship or cargo.

1246. *Bottomry* is a contract in the nature of a mortgage, by which the ship owner, or the master on his behalf, pledges the keel or bottom of the ship, *pars pro toto*, as security for money which he borrows for the use of the ship, in con-

¹¹⁶ *Newcastle Fire Ins. Co. v. McMorran*, 3 Dow, Parl. Cas. 255; *Burritt v. Saratoga Mutual Ins. Co.*, 5 Hill N. Y. 188; *Col. Ins. Co. of Alexandria v. Lawrence*, 2 Pet. 25, 48.

¹¹⁷ *Ingraham v. South Car. Ins. Co.*, 3 Brev. So. C. 522.

¹¹⁸ *Lexington Fire, etc., Co. v. Paver*, 16 Ohio, 324.

¹¹⁹ *Bufe v. Turner*, 6 Taunt. 338. It is usually made a condition in a fire policy that the applicant shall answer truly all the inquiries addressed to him. These are principally as to the relative situation of neighboring buildings, use of the insured building, as to the applicant's title and the incumbrances on the buildings. It is usually stipulated also that the policy shall be void if the assured shall assign the policy, or sell the subject, or effect other insurance, or carry on hazardous trades in the building, or store hazardous articles. Any violation of these stipulations avoids the policy, but the full treatment of the cases on these matters would take too much space here. See *Phillips, Ins. Nos.* 866-890.

¹²⁰ *Liscom v. Boston Mutual Fire Ins. Co.*, 9 Metc. Mass. 205.

¹²¹ *Trask v. State Ins. Co.*, 29 Penn. St. 198; *Peoria Ins. Co. v. Lewis*, 18 Ill. 553; *West Branch Ins. Co. v. Helfenstein*, 40 Penn. St. 289.

¹²² *Inland Ins. Co. v. Stauffer*, 33 Penn. St. 397.

templation of a particular voyage, or for a particular and fixed period of time; and it is stipulated that if the ship should be lost in the course of the voyage or during that time, by any of the perils enumerated in the contract, the lender shall lose his money; but if the ship should arrive in safety, then he shall receive back his principal, and also the interest agreed upon, which is generally called *marine interest*, however this may exceed the usual interest for the use of the money.¹²³

1247. There is much resemblance between bottomry and insurance. In one, the lender takes the risks, and in the other, the insurer. In one, the profit, in the other, the premium, are the considerations for the maritime risks, which are supported upon the same principle and may be modified in the same manner. The amount of these profits and of this premium is lower or higher, according to the duration and the nature of the risks and of the agreement. Neither have any effect, unless the objects which are bound for the loan, or which have been insured, have been exposed to maritime risks, which the same circumstances and the same events cause to begin and end.

If these contracts resemble each other, there are also many differences between them. In bottomry, the lender actually furnishes a certain sum of money; in insurance, the insurer furnishes nothing; on the contrary, he receives a premium, which is frequently paid to him at the time of the agreement, but which when it is not paid in cash is a claim which he may assign, or for which he may procure a guaranty. In bottomry, there must be things which may be given in pledge; in insurance, all that is required is the possibility of a loss.

Bottomry differs from a simple loan. In a loan, the money is at the risk of the borrower, and must be paid at all events; in bottomry, the money is at the risk of the lender during the voyage. Upon a loan only lawful interest can be charged; upon bottomry any interest may be legally reserved which the parties agree upon.

1248. The contract of bottomry is usually in form a bond, called a bottomry bond, conditional for the repayment of the money loaned, with the interest agreed on, if the ship arrives in safety at the end of the voyage or period of time contemplated by the contract. It should specify the sum loaned, and at what interest or maritime profit, the subject upon which the loan is made, the name of the vessel and of the captain, and of the lender and borrower, the description of the voyage, and the risks assumed by the lender.

1249. Though usually a sum of money is the thing loaned, yet other things may be loaned; but in all cases the borrower must acquire a title to them, for otherwise the contract would change its nature; as, for example, if only the use of a thing were loaned, for then the borrower would never have owned the property.

In the contract of bottomry the ship, her tackle and apparel, are the objects on which the loan is made. When the loan is made on other property exposed to maritime risk, the contract is called *respondentia*.

1250. By *risk* is understood the danger to which a thing is exposed. Maritime risks are perils which are incident to a sea-voyage,¹²⁴ or those fortuitous events which may happen in the course of the voyage.¹²⁵

It is essential that the lender should run the risks of the things on which the loan is made; if a contract were made by which he should be relieved from them, it would be no longer bottomry, but a simple loan.¹²⁶

¹²³ The *Draco*, 2 Sumn. C. C. 157.

¹²⁴ 1 Marshall, Ins. 215.

¹²⁵ Pothier, Contr. d'Assur. n. 49; Pardessus, Dr. Com. n. 770.

¹²⁶ Greely v. Smith, 3 Woodb. & M. C. C. 236.

The risks the lender runs are generally the same as those for which the insurer is liable. But the parties may extend them beyond these limits.

In case of wreck, the property saved continues liable to the bottomry, but if the loss is caused by the perils assumed by the lender, the borrower remains liable only to the amount of the property saved. It is usual to provide, in case of damage by the enumerated perils, that the lender shall bear his share of loss.

1251. There can be no contract of bottomry if the borrower is not bound to pay to the lender, besides the thing loaned, maritime profits for the risks he has taken upon himself. If the contract did not contain such a clause, it would be a kind of gift in case of a sinister event, and a simple loan in case of a successful result.

This profit is usually fixed in a certain sum of money, but it may be of anything else, even a part of the profits arising from the transaction; but this would rather be a partnership than the contract of bottomry.

1252. The lender on bottomry has a lien on the ship which overrides and takes precedence of all prior liens. It holds good against subsequent purchasers, but, like all other admiralty liens, may be lost by unreasonable delay. But the seamen have a lien for their wages for the voyage for which the loan is taken, and for subsequent voyages, superior to the bottomry lien.

1253. Where the loan is taken by the master, if the vessel arrives safely, the lender has a lien on the vessel, and the borrower is also personally liable. But the owners are only liable to the amount of the pledge which comes into their possession. Thus if the vessel is lost by barratry, and the lender has not assumed that risk, the owners are not personally liable on the bond.¹²⁷

1254. The owner of a vessel may borrow upon bottomry whether the ship is in a home port or not; and it is immaterial whether the money be borrowed for the use of the ship or not.¹²⁸ The only question in such a case would be whether the contract would constitute a lien in admiralty, or would be enforceable merely as a common law lien. The better opinion is that it is a true admiralty lien.

1255. The master of a ship may borrow upon bottomry in certain cases. It is immaterial whether the master be appointed by the owner, or necessarily appointed abroad, or having been mate, has succeeded to the command on the death of the master.

The authority of the master to hypothecate the ship rests upon the necessity of the case, and is supported only upon proof of such necessity. In general, it may be said that a master cannot borrow on bottomry if he can get the money in any other way; but there are a few material facts upon which the question usually depends.

The master cannot borrow if he can communicate with the owner, and for this reason he cannot hypothecate the ship in a home port, or in the port where the owner resides.¹²⁹ Nor can he hypothecate the ship if he could have obtained the necessary money or supplies on the personal credit of the owner or himself.

He can only borrow when a loan is absolutely necessary for the safe continuance of the voyage, and the lender must inquire into the necessity.¹³⁰ The master is a competent witness to prove that the necessity existed.¹³¹

1256. A bottomry bond cannot be given for prior advances unless in pursu-

¹²⁷ *The Virgin*, 8 Pet. 538.

¹²⁸ *The Draco*, 1 Sumn. C. C. 157; *Conard v. Atlantic Ins. Co.*, 1 Pet. 436; *The Atlas*, 2 Hagg. Adm. 48.

¹²⁹ *The Enterprise*, Bee, Dist. Ct. 345; *The Ship A. E. I. Bee*, Dist. Ct. 120.

¹³⁰ *The Aurora*, 1 Wheat. 96.

¹³¹ *The Medora*, 1 Sprague, Dist. Ct. 138; *The Magoun*, Olc. Dist. Ct. 55.

ance of an agreement at the time the advances were made.¹²⁵ If the master fraudulently gives a bond for a larger sum than that actually advanced, the bond is void, and the lender has no lien on the ship even for the sum actually advanced.¹²⁵

1257. *Respondentia* is a loan of money on goods laden on board of a ship, which in the course of the voyage must, from their nature, be sold or exchanged on maritime interest, upon this condition: that if the goods should be lost in the course of the voyage by any of the perils enumerated in the contract, the lender shall lose his money; if not, that the borrower shall pay him the sum borrowed, with the interest agreed upon.

1258. The contract is called *respondentia* because the money is lent on the personal security of the borrower. It differs from bottomry principally in the following circumstances: bottomry is a loan on the ship, *respondentia* on the goods; the money is to be repaid to the lender, with maritime interest, in the one case upon the arrival of the ship, and of the goods in the other. In all other respects the contracts are nearly the same, and they are governed by the same principles. In the former, the ship and tackle, being hypothecated, are liable as well as the person of the borrower; in the latter, the lender has, in general, only the personal security of the borrower.¹²⁶

As in bottomry, so in *respondentia*, a master can only borrow when a necessity exists; and he must resort first to the ship and freight to obtain money.

1259. If the contract clearly contemplates that the goods on which the loan is made are to be sold or exchanged free of any lien in the course of the voyage, the lender must rely solely upon the personal liability of the borrower.

1260. *Gaming* is a contract between two or more persons, by which they agree to play by certain rules at cards, dice, or other contrivance, and that one shall be the loser and the other shall be the winner.

When considered in itself and without any end proposed by the players, there is nothing contrary to natural equity, and the contract may be viewed as a reciprocal gift, which the parties make of the thing played for, under certain conditions.

The practice of gaming, however, has been justly considered as perverting the activity of the mind, tainting the heart, and depraving the affections; and by the frequent and great reverses of fortunes which it occasions, becoming the source of great misery, suggesting constant temptations to fraud and the perpetration of the most atrocious crimes. In most governments, therefore, games have been laid under certain restrictions, and money lost at play may be recovered back, if paid, or if it be not paid, no action lies to compel the payment.

Some games depend altogether on skill, others upon chance, and some others are of a mixed nature. Billiards and chess are examples of the first; lottery, of the second; and backgammon, of the last.

1261. At common law all games are lawful, unless some fraud has been practiced or such games are against public policy. Each of the parties to the contract must have a right to the money or thing played for; he must have given his full and free consent, and not be entrapped by fraud; there must have been equality in the play; the play must have been conducted fairly.

But even when all these rules have been observed, the courts will not countenance gaming by giving too easy a remedy for the recovery of money won at play. Indeed, it must be confessed that the law greatly descends from its dignity when it lends its aid to give effect to any game, however innocent.¹²⁷

¹²⁵ *The Virgin*, 8 Pet. 538; *The Hebe*, 2 Wm. Rob. Adm. 146; *Aurora*, 1 Wheat. 96; *Mary*, Paine, C. C. 674.

¹²⁶ *Brig Ann C. Pratt*, 1 Curt. C. C. 340.

¹²⁷ *Marshall*, Ins. 784; 1 Bell, Comm. 535.

¹²⁸ Bacon, Abr. *Gaming* (A).

1262. When fraud has been practiced, as in all other cases, the contract is void; and in some cases, when a party has been guilty of cheating by playing with false dice, cards, and the like, he may be indicted at common law, and fined and imprisoned.¹³⁶

1263. Statutes have been passed in perhaps all the states forbidding gaming, prohibiting the recovery of money won, and allowing the recovery of money lost and paid over.

1264. A *wager* is a bet; a contract by which two parties, or more, agree that a certain sum of money, or other thing, shall be paid or delivered to one of them, by the other, on the happening or not happening of a specified event. Sometimes the thing bet is put into the hands of a third party, called a stakeholder, to be delivered to the winner.

1265. The common law does not prohibit all wagers,¹³⁷ but to restrain them within the bounds of justice the following conditions must be observed: each of the parties must have a right to dispose of the thing which is the object of the wager; each must give a perfect and full consent to the contract; there must be equality among the parties; there must be good faith between them; the wager must not be forbidden by law.¹³⁸

1266. The common law is followed in some of the states, and wagers on indifferent subjects not prohibited by statute are lawful.¹³⁹ The contrary is held in other states.¹⁴⁰

1267. Wagers on the event of a public election, laid before the poll is open,¹⁴¹ or after it is closed,¹⁴² are unlawful. Wagers are against public policy, if they are made in restraint of marriage,¹⁴³ or as to the mode of playing an illegal game,¹⁴⁴ or on an abstract, speculative question of law, not arising out of circumstances in which the parties have a real interest.¹⁴⁵

1268. Wagers as to the sex of an individual,¹⁴⁶ or whether an unmarried woman had ever borne, or would have a child,¹⁴⁷ or whether Napoleon Bonaparte would be removed or escape from St. Helena within a certain time,¹⁴⁸ have been severally holden to be illegal. The supreme court of Pennsylvania have laid down the rule, through one of the judges, that every bet about the age, or height, or weight, or health, or circumstances, or situation of any person, is illegal; and this, whether the subject of the bet be a man, woman, or child, married or single, a native or foreigner, in this country or abroad.¹⁴⁹

¹³⁶ 1 Russell, Cr. 106.

¹³⁷ Morgan v. Richards, 1 Browne, Penn. 171; 11 Coke, 87.

¹³⁸ Pothier, Jeu. n. 8.

¹³⁹ Johnson v. Fall, 6 Cal. 359; Bass v. Peevey, 22 Tex. 295; Beadles v. Bless, 27 Ill. 320; Grayson v. Whatley, 15 La. Ann. 525.

¹⁴⁰ Perkins v. Eaton, 3 N. H. 155; Ball v. Gilbert, 12 Metc. Mass. 399.

¹⁴¹ Smith v. McMasters, 2 Browne, Penn. 182; Allen v. Hearn, 1 Term, 56; Wheeler v. Spencer, 15 Conn. 28; Murdock v. Kilbourn, 6 Wisc. 468; McAllister v. Hoffman, 16 Serg. & R. Penn. 147.

¹⁴² McAllister v. Hoffman, 16 Serg. & R. Penn. 147; Laval v. Myers, 1 Bail. So. C. 486.

¹⁴³ Good v. Elliott, 3 Term, 693; 10 East, 22.

¹⁴⁴ 2 H. Blackst. 43.

¹⁴⁵ Henkin v. Guerres, 12 East, 247. And see Henkin v. Guerres, 2 Campb. 408 and note.

¹⁴⁶ Henkin v. Guerres, 12 East, 247; 1 Barnw. & Ald. 683.

¹⁴⁷ Ditchburn v. Goldsmith, 4 Campb. 152.

¹⁴⁸ Phillips v. Ives, 1 Rawle, Penn. 36; Gilbert v. Sykes, 16 East, 150.

¹⁴⁹ Per Huston, J., Phillips v. Ives, 1 Rawle, Penn. 42.

CHAPTER XI.

AGENCY.

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1269. One of the most important branches to be considered in the law of contracts is what relates to the subject of agency. Many of the transactions of life, particularly those which relate to commercial business, are performed by agents. Not a merchant but must deal, frequently, with agents of every description, factors, carriers, auctioneers, brokers, masters of ships, and numerous others. These agencies may be at home or abroad; they may be for the most trifling, as they are often for the most important affairs; they are either temporary or permanent, and the rights and obligations of the principals and the agents are numerous and varied. It will not be possible to do more than examine the first elements of the subject in the compass allowed to it in this work.

1270. An *agency* is an agreement, express or implied, by which one of the parties, called the principal, confides to the other, denominated the agent, the management of some business to be transacted in his name or on his account, and by which the agent assumes to do the business and to render an account of it.

1271. The contract of agency is not very unlike the mandate of the civil law, which has been adopted in our own. The principal difference is this, that the agency is always understood to be paid for, while a mandate is always gratuitous. It resembles more nearly the contract of letting or hiring. Having treated of these matters when discussing the subjects of mandate and hiring, the present chapter will be dedicated to commercial agencies. We shall treat in order of the principal, the agent, the rights of the principal, the liabilities of the principal, the rights of the agent, the liabilities of the agent, and the dissolution of the agency.

1272. The *principal* is one who, being competent to contract, and who is *sui juris*, employs another to do a lawful act for his benefit, on his own account. He is called principal, constituent, or employer; and he who is thus employed is denominated the agent, attorney, proxy, or delegate of the principal.

1273. Every person is presumed, when *sui juris*, to be capable of disposing of his property, and of performing such acts in relation to it as he may deem proper; and these he may perform not only in his own person, but by the interposition of another, for the acts of his agent lawfully authorized are considered as his own: *qui facit per alium facit per se*. But a person who is not *sui juris*, or who is incapable of entering into a contract, cannot be a principal and appoint another to do that for him which he could not do for himself.

Persons who are not *sui juris* in all respects, but of limited capacity, as infants and married women, may appoint agents to do such acts as they could do themselves. Thus, an infant may appoint an agent to do an act which may be for his benefit, or a married woman may appoint an agent to deal with her separate property as she could deal herself.

1274. Sometimes several persons who have a joint interest in the subject matter of the agency appoint jointly the same person as agent to transact their joint business. Difficulties arise when instructions are given by one person who acts on behalf of himself and others as to the effect of such instructions. In cases of partnership, the instructions of one partner are in general sufficient authority to the agent for all the members of the firm.¹ But the rule is different with regard to persons who own a chattel in which they have a separate, distinct, though undivided interest; in such case one of them cannot appoint an agent for all. A tenant in common cannot, therefore, appoint an agent for both to sell the property. There is an exception as to the last-mentioned rule with regard to part owners of ships; in the absence of any known dissent, each is deemed the agent of the others as to the ordinary repairs, employment, and business of the ship.

1275. An agent is one who undertakes, for a consideration, to manage some affair or business to be transacted for another, by the authority and on account of the latter, who is called the principal, and to render an account of it.

1276. Most persons may be appointed as agents and exercise an authority delegated to them. It is not indispensable that the person be *sui juris*, or capable of acting in his own right, in order to be qualified to act as an agent for another. Thus infants, *femes covert*, and aliens, may act as agents for others.² But to this rule an exception must be made as to lunatics, idiots, or other person *non compos mentis*, for they have not the capacity to act for others any more than they can for themselves; and when a married woman acts, it must be under the express or implied consent of her husband.

There are other exceptions which apply to persons *sui juris*, who are incapable of becoming agents because they cannot assume incompatible duties and characters, nor take upon themselves the character of agents when they have an adverse interest or employment.³ It is a rule that no person can be an agent for another in buying goods from himself; nor can one holding a fiduciary situation, such as executor, trustee, guardian, attorney, or agent, contract with his principal in relation to the property he holds in that capacity as in ordinary cases where the relation does not exist.⁴

1277. When the authority is given to a sole agent, little or no difficulty can arise; the agent alone acts for the principal, and no substitute can perform the act unless the letter of attorney authorize a substitution.

¹ Tillier v. Whitehead, 1 Dall. 269. As the partner cannot bind his co-partner by deed, it follows that he cannot appoint an agent for both by letter of attorney under seal. Clement v. Bush, 3 Johns. Cas. N. Y. 180; Harrison v. Jackson, 7 Term, 207.

² Bacon, Abr. Authority, B; Comyn, Dig. Attorney, c. 4; Comyn, Dig. Baron and Feme, P. 3.

³ Stainback v. Read, 11 Gratt. Va. 281.

⁴ Bunker v. Miles, 30 Me. 431; Walker v. Palmer, 24 Ala. n. s. 358; Moore v. Mandlebaum, 8 Mich. 433.

1278. But when the authority is given jointly to several persons, questions frequently arise as to whether they must all join in the performance of an act to bind the principal, or whether one or any number less than the whole can perform any of the acts delegated to them so as to bind the principal. The following rules may be deduced from the cases on this subject:

When the authority is given to two or more persons to do an act, they must in general join to perform it; a letter of attorney given to two to sell property is, therefore, not well executed by one alone.⁵ But this rule is not so inflexible as to admit of no exceptions; for commercial convenience it has been held that where a joint consignment of goods has been made to two factors to sell, whether they are partners or not, each of them has full power to sell or dispose of them.⁶

An authority given to two or more, jointly and separately, must in general be executed by one alone, or by all the agents; it cannot be executed by several less than the whole number.⁷

When, from the words of the principal, it is evident that he intended to give the power to a number of persons jointly and separately, or to a number less than the whole, the power may be executed, according to such intent, by one, by several less than the whole, or by them all; as, where the principal authorized fifteen persons by a power of attorney, "jointly and separately for him and in his name to sign and order all such policies as they, as his attorneys, or any of them, should jointly and separately think proper," it was held that a policy executed by four of these attorneys was binding on the principal.⁸

But these rules apply only to private agents. When the agency is of a public nature, the power given to several may be executed by any number of them.⁹

1279. Agents are very numerous, but still they may be classified so as to include all those which are the most common. They are either attorneys at law or attorneys in fact.

1280. An *attorney at law* is an officer in a court of justice who is employed by a party in a cause to manage the same for him. They assume different names, as they perform their functions in different courts. They are attorneys in the courts of common law, solicitors in courts of equity, and proctors in courts of admiralty, and, in England, in the ecclesiastical courts. Attorneys are very different from counsel or advocates in England and in some of the American courts, but in most of the states the offices are blended together. The further discussion of this subject is postponed until we come to consider the courts and their offices.

1281. *Attorneys in fact* assume different names according to their employments; they are auctioneers, brokers, clerks, consignees, factors, masters of ships, ships' husbands, supercargoes, and partners. But in a more confined sense the meaning of attorney in fact is restricted to one who is appointed by a special power or letter of attorney, so that he is appointed *in factum*, for the deed or act required to be done.

1282. An *auctioneer* is a person authorized by law to keep an auction, and,

⁵ *Copeland v. Merchants' Ins. Co.*, 6 Pick. Mass. 198; *Coke*, Litt. 49; *Comyn*, Dig. *Attorney*, C 11; *Heard v. March*, 12 Cush. Mass. 580; *Low v. Perkins*, 10 Vt. 532.

⁶ *Godfrey v. Saund*, 3 Wils. 94; *French v. Price*, 24 Pick. Mass. 13.

⁷ *Coke*, Litt. 181; *Bacon*, Abr. *Authority*, C.

⁸ *Guthrie v. Armstrong*, 5 Barnew. & Ald. 628.

⁹ *Coke*, Litt. 181, b; *Comyn*, Dig. *Attorney*, C 15; *Bacon*, Abr. *Authority*, C; *Commonwealth v. Canal Commissioners*, 9 Watts, Penn. 471; *County Commissioners v. Lecky*, 6 Serg. & R. Penn. 170; *Doe v. Godwin*, 1 Dowl. & R. 259; *Townsend v. Wilson*, 3 Madd. Ch. 361; 1 Barnew. & Ald. 608; *Jewett v. Alton*, 7 N. H. 253; *Scott v. Detroit Society*, 1 Dougl. Mich. 119; *Caldwell v. Harrison*, 12 Ala. n. s. 755.

for a consideration, called a commission, to sell the goods of others at public sale.

He is the agent of both parties under certain circumstances. Primarily he is the agent of the seller of the goods, for until they are sold he represents no other. But the moment the goods are sold, which is signified generally by knocking down his hammer, though any other mode of showing his assent is equally binding, and inserting the name of the buyer in his books, or making a memorandum of the sale, he becomes the agent of the buyer as well as of the seller; and such memorandum will bind both parties, as being a memorandum sufficiently signed by an agent of both parties within the statute of frauds.¹⁰

An auctioneer may be appointed by parol to sell lands, but not to make a deed of them.¹¹

1283. The rights of the auctioneer are, to charge a commission for his services; when an agreement is made as to the amount, that is binding upon the parties; in the absence of any agreement, he is entitled to the usual commissions: he has an interest in the goods sold by him, and a lien on the same and the proceeds thereof for his commissions; and he may sue the purchaser in his own name, or in the name of his principal.¹²

1284. His liabilities are, to the owner, for a faithful discharge of his engagements in the sale, and if he gives credit without authority, for the value of the goods; he is responsible for the duties due the government;¹³ he is answerable to the purchaser when he does not disclose the name of his principal;¹⁴ he may be sued when he sells the goods of a third person after notice not to sell them, and if he sells stolen goods, though innocently, he is liable to the owner in an action of trover.¹⁵

1285. *Brokers* are commercial agents, engaged for others in the negotiation of contracts relative to property, with the custody of which they have no concern, for compensation usually called brokerage.

Strictly speaking, a broker is a mere negotiator between other parties, always acting in the name of his employers, and never in his own. He differs from a commission merchant, because he never has in his possession the property which is the object of the contract, and always acts in the name of his employers. He is unlike a clerk, because he wholly supplies the place of his principal, whereas the latter attends to a part of the business, while his employer superintends the whole.

Like an auctioneer, the broker is the agent, primarily, of the party by whom he is employed, and becomes the agent of the other only when the bargain is definitely settled, as to its terms, between the principals. He then usually gives to the buyer a memorandum of the contract, signed by himself, which is called a sold note, and to the seller a like memorandum, then denominated a bought note.¹⁶ The broker is a middle man between the parties, and although for some purposes he may be considered the agent of both,¹⁷ he cannot, without fraud, act for both, concealing his agency for one from the other, in a case

¹⁰ *Cleaves v. Foss*, 4 Me. 1; *Alna v. Plummer*, 4 Me. 258; *McComb v. Wright*, 4 Johns. Ch. N. Y. 659; *Blackwood v. Leman*, Harp. So. C. 219; *Burke v. Haley*, 7 Ill. 614; *Pike v. Balch*, 38 Me. 302. Such a memorandum is not sufficient when the auctioneer is himself the vendor and party in interest. *Bent v. Cobb*, 9 Gray, Mass. 397.

¹¹ *Yourt v. Hopkins*, 24 Ill. 326.

¹² *Beller v. Block*, 19 Ark. 566.

¹³ *State v. Poulterer*, 16 Cal. 514.

¹⁴ *Mills v. Hunt*, 20 Wend. N. Y. 431.

¹⁵ *Hoffman v. Carow*, 20 Wend. N. Y. 21; 22 Wend. N. Y. 285.

¹⁶ 1 Bell, Comm. 435; *Story*, Ag. § 28. There is some confusion in the books, some calling a sold note that given to the seller, and a bought note that delivered to the buyer.

¹⁷ Thus his memorandum binds both parties under the statute of frauds. *Hinckley v. Arey*, 27 Me. 362.

where he is entrusted by both with a discretion as to buying and selling, and when his judgment is relied upon.¹⁸

A broker cannot act by deputy, because the confidence reposed in him is altogether of a personal nature.¹⁹

1286. Brokers are of several sorts, according to the business in which they are employed.

Exchange brokers are those who negotiate matters of exchange with foreign countries.

Ship brokers are those who transact business between the owners of vessels and merchants who send cargoes.

Insurance brokers are those who manage the concerns of both the insurer and the insured.

Pawn brokers lend money upon goods to necessitous people upon interest.

Stock brokers are those employed to buy and sell shares of stock in corporations and companies.

1287. A *clerk* is a person employed by a merchant, manufacturer, or other person, to transact certain parts of the employer's business, while his principal superintends the whole. He always acts in the name of the principal, and is authorized to transact generally all such business as is entrusted to him, and to bind his employer, while he keeps within the bounds of his express or implied authority;²⁰ but the mere acting as a clerk to a merchant does not authorize the person so acting to sign notes in the name of the master.²¹

1288. A *factor* is an agent employed to sell goods or merchandise, consigned or delivered to him, by or for his principal, for a compensation commonly called *factorage* or *commission*.²² He is also called a *commission merchant* or a *consignee*. When he resides in the same country with his principal, he is called a *home factor*; and a *foreign factor* when he resides in a different state or country. When he accompanies the ship taking a cargo abroad, which is consigned to him for sale, he usually assumes the name of *supercargo*.²³

His compensation is called *factorage*, or *simple commission*, when he does not guarantee the solvency of the buyer of the goods he sells; when he does so guarantee the sale, a higher compensation is given to him, known by the name of *del credere commission*.²⁴

Being entrusted in consequence of some personal confidence, a factor cannot delegate his authority to another, though he may employ clerks under him to transact the business.

Factors buy and sell in their own names, and have a special property in the goods, and as to third parties are treated as owners. They may therefore sue and be sued in regard to the goods.

But as between the factor and the principal, the former cannot treat the goods as his own. He cannot pledge them for his own debts.²⁵ But he may pledge them to secure advances made for the principal or on account of charges against the goods as duties, storage, etc.

¹⁸ *Farnsworth v. Hemmer*, 1 All. Mass. 494; *Gardner v. Ogden*, 22 N. Y. 327. A broker who disposes of bank stock for another is the agent of both parties. *Collins v. Williams*, 8 Harr. & J. Md. 38.

¹⁹ *Loomis v. Simpson*, 13 Iowa, 532.

²⁰ *Portland v. Lewis*, 2 Serg. & R. Penn. 197; *Eagle Bank v. Smith*, 5 Conn. 71.

²¹ *Terry v. Fargo*, 10 Johns. N. Y. 114.

²² *Paley*, Ag. 13; *Livermore*, Ag. 68; *Story*, Ag. § 33; 1 Bell, Comm. 385; 3 Chitty, Com. Law, 193; *Baring v. Corrie*, 2 Barnew. & Ald. 143.

²³ *Livermore*, Ag. 69, 70; *Beawes*, Lex Mer. 44; 1 Domat, b. 1, t. 16, § 3, art. 2.

²⁴ This is an Italian phrase, which signifies that the agent believes the buyer to be good. In the French law, the expression used, which has the same meaning as that in Italian, is *ducroire*. 2 Pardessus, Dr. Com. n. 564.

²⁵ *Van Aunring v. Peabody*, 1 Mas. C. C. 440.

1289. *A ship's husband* is an agent appointed by the owners of a ship, and invested with authority to make the requisite repairs, and attend to the management, equipment, and other concerns of the ship; he is generally authorized as the general agent of the owners in relation to the ship in her home port. He is usually, but not necessarily, a part owner.²⁶

By virtue of his agency he is authorized to direct all proper repairs, equipments, and outfits of the ship; to hire the officers and crew; to enter into contracts for freight or charter of the ship, if that is her employment; and to do all other necessary and proper acts, to prepare and despatch her for her intended voyage.²⁷

He cannot borrow money generally for the use of the ship, nor is he authorized to waive the lien on the cargo for freight. It is stated in the text-books that a ship's husband has no authority to insure, but it would seem that where he is also a part owner he may insure the whole interest for the other owners.²⁸

1290. *The master of a ship* is the person who has the command of her, and is popularly known by the name of captain. The powers delegated to this agent depend, of course, upon the express authority given to him. Sometimes he is appointed supercargo and consignee of the cargo, in which case he has more duties to perform than usually belong to him; and then the rights and duties arising from this extra business are treated as distinct, as if the acts appropriated to each character were confided to different persons.

His general powers are to choose his crew, and this is but reasonable, because he is responsible for their acts; but a just deference to the rights of the owner requires that he should be consulted, as he, as well as the master, is responsible for the acts of the crew. He may repair the ship; and if he is not in funds to pay the expenses of such repairs, he may borrow money, when abroad, on the credit of the owners of the ship.²⁹

On board the master is invested with almost arbitrary power over the crew, being responsible for the abuse of his authority.³⁰

1291. From the nature of the contract of partnership, the *partners* are presumed to be the agents of each other with respect to the partnership business carried on in the usual manner. Every time a partner makes a sale, it is not requisite he should get the consent of his co-partner; this is supposed to have been given to him.³¹ But this presumed authority is confined to the usual partnership business; a partner cannot, therefore, make a conveyance of the real estate of the firm, nor bind his co-partner by deed.³² And as a general assignment for the benefit of creditors puts an end to the partnership, it is doubtful whether one partner has an implied authority to make such an assignment so as to bind the firm.³³

1292. *Public agents* stand upon very different grounds from private agents,

²⁶ Hall, Mar. Loans, 142, n.; Abbott, Shipp. part 1, c. 3, s. 2.

²⁷ 1 Livermore, Ag. 72, 73; Story, Ag. § 35; 1 Bell Comm. 503, 5th ed.

²⁸ Cumpston v. McNair, 1 Wend. N. Y. 457; Phillips Ins. Nos. 1852, 1854.

²⁹ Abbott, Shipp. 127; Bowyer, Mod. Civ. Law, 297. The authority of the master extends generally to all the acts which are necessary to carry out the purposes of a voyage or to employ the ship profitably. But he cannot perform acts which from their nature cannot be necessary for this purpose, as to sell the ship. Johnson v. Wingate, 29 Me. 404. His power as to repairs extends only to such as are necessary; and when for this purpose he hypothecates the ship, the lender must see to it at his peril that the necessity exists. See before, 1255.

³⁰ Abbott, Shipp. 162.

³¹ Watson, Partn. 167; Gow, Partn. 53. A partner may act as the agent of another firm, in the same town, of which his co-partner is also a member, and notice to the co-partner binds such other firm. Wilkin v. Boyd, 3 Watts, Penn. 39.

³² Watson, Partn. 218; Gow, Partn. 84.

³³ Pearpoint v. Graham, 4 Wash. C. C. 232; Story, Partn. § 101.

of whom only we have hitherto spoken. As a general rule, a public agent is not responsible individually when he contracts on behalf of the state.³⁴ A public officer, acting in his official capacity, is presumed to act on behalf of the government, although he may sign the contract in his own name. And as he is not responsible, so the agent cannot enforce the contract entered into by him; the suit must be brought in the name of the government.³⁵

The contract by the agent may be by parol or under seal, and still the agent will not be bound if known to act for the government.³⁶

This general presumption, that a public agent acts for and on behalf of the state, may be rebutted by showing expressly, or otherwise, that in making the contract the agent did not act as a public agent, but in his own private capacity, and then he will be liable upon the contract, and may enforce it.³⁷

1293. *The appointment of an agent* is the authority by which the principal delegates to the agent the power to act for him. This may be done in two ways: by an express and by an implied appointment.

1294. Formerly it was considered necessary that the appointment should be by deed, that it might appear that the attorney or his substitute had a commission or power to represent the party, and also that it might appear that the authority had been well pursued.³⁸ In modern times, however, and particularly in commercial transactions, it is not now requisite that the appointment should be by deed, and it may be given either by writing not under seal, or by a mere correspondence, or simply by parol.

The old rule, however, is still considered in full force when the attorney is authorized to perform an act by deed, as to convey real estate; then the authority must be by deed. A mere unsealed writing will not be sufficient at law, though a court of equity might, in such case, compel the principal to confirm the deed.³⁹ But the principle is not carried out by requiring that when the act to be done is to be in writing, unsealed, it should be authorized in writing, for it may be done by parol.⁴⁰

When the authority is express the agent is bound to execute the power according to the trust reposed in him, and any act beyond that authorized would be done without authority, because no man can be bound without his consent.⁴¹ But the principal will be bound when he has, by his acts, induced the opinion that he has given more extensive powers than were in fact given.⁴²

1295. But the most usual mode of making appointments is not by writing, sealed or unsealed, or even expressly by parol. It is implied from the acts of

³⁴ *Tutt v. Lewis*, 3 Call, Va. 233; *Adams v. Whittlesey*, 3 Conn. 560; *Walker v. Swartwout*, 12 Johns. N. Y. 443; *Osgood v. Grosvenor*, 1 Root, Conn. 89; *Hodges v. Runyan*, 30 Mo. 491.

³⁵ *Macbeath v. Haldimand*, 1 Term, 172, 180; *White v. Bennett*, 1 Mo. 102; *Irish v. Webster*, 5 Me. 171; *United States v. Dugan*, 3 Wheat. 172.

³⁶ *Unwin v. Woolseley*, 1 Term, 674; *Walker v. Swartwout*, 12 Johns. N. Y. 444; *Hodgson v. Dexter*, 1 Cranch, 345, 363.

³⁷ *Swift v. Hopkins*, 13 Johns. N. Y. 313; *Olney v. Wickes*, 18 Johns. N. Y. 122; *Sheffield v. Watson*, 18 Johns. N. Y. 122; *Brown v. Rundlett*, 15 N. H. 360.

³⁸ *Bacon, Abr. Authority*, A.

³⁹ *Harrison v. Jackson*, 7 Term, 203; *Berkley v. Hardy*, 5 Barnw. & C. 355; *Morrow v. Higgins*, 29 Ala. N. s. 448; *Smith v. Perry*, 5 Dutch. N. J. 74; *Ledbetter v. Walker*, 31 Ala. N. s. 175. An agent may be appointed by parol to sell land, and may make a binding agreement of sale, though he cannot execute the conveyance. *Doughady v. Crowell*, 3 Stockt. N. J. 201; *Dodge v. Hopkins*, 14 Wisc. 630. If an agent appointed not under seal executes a sealed instrument in the name of the principal, if the seal is unnecessary, it may be rejected, and the instrument will be valid as an unsealed agreement. *Minor v. Willoughby*, 3 Minn. 225.

⁴⁰ *Paley, Ag. by Lloyd*, 160; *Anon.* 12 Mod. 564.

⁴¹ *Welsh v. Parish*, 1 Hill, So. C. 155.

⁴² *Schimmelpennick v. Bayard*, 1 Pet. 264.

the parties; and such an appointment has as much binding force as the most formal delegation, except when, as we have seen, the authority must be given by deed. Take the case of a clerk in a store; he sells goods and transacts business for his employer, in his presence, without having received any express authority in writing or otherwise; his acts, in the course of the usual business of the employer, will be presumed to have received his sanction; a sale made by him, or the receipt of money by him from a customer, will bind the principal. The obligation in such cases is contracted by the mere consent of the parties; *obligatio mandati, consensu contrahentium consistit*.⁴³

1296. Though formerly a corporation could not appoint an agent in any other way than by deed, now, for all lawful purposes, it may delegate its authority by expressly bestowing power on an agent by writing, without seal, by parol, or such authority may be implied from its acts.⁴⁴ A corporation is therefore liable for the acts and omissions of its agents in their appropriate duties, but not for their acts out of the scope of their employment.⁴⁵

1297. By *authority* is meant the lawful delegation of power by one person to another. We have seen that as to its delegation the authority is express or implied. With regard to its extent, it is general or special; as to its object, it is lawful or unlawful; and as to the right it confers, it is either a naked authority or an authority coupled with an interest.

1298. A *general authority* is one which extends to all acts connected with a particular employment, embracing an indeterminate power. A general agency may be express, as when the principal authorizes his agent to transact all his business whatever, in direct terms; or it may be implied, as when the principal permits the agent to do all manner of acts for him, as to buy and sell goods, to collect debts, to draw bills or other commercial papers, to rent his estate, and all such other acts, and from time to time approves of and ratifies such acts, he will be bound by any future similar acts of the agent.⁴⁶ But a man may be a general without being a universal agent; and general language, giving the most extensive agency, will be confined within such bounds as to make the agent a general and not a universal agent. If, for example, a merchant going abroad for a temporary purpose should give a letter of attorney, authorizing his agent to buy and sell any property for him, and generally to make contracts in his name, this would be construed as an authority to buy and sell only in his ordinary business as a merchant, and would not authorize the agent to sell the principal's furniture or to convey his real estate.

A general agent cannot submit his principal's affairs to arbitration.⁴⁷

1299. A *special agent* is one whose authority is confined to a particular or an individual instance;⁴⁸ but in another sense it may be said that every express agency is special, because it specifies what is to be done. It is a general rule that he who is invested with a special authority must act within the bounds of his authority, and he cannot bind the principal beyond what he is authorized to do.⁴⁹

⁴³ Dig. 17, 1, 1.

⁴⁴ Bank of Columbia v. Patterson's admr. 7 Cranch, 299; Bank of U. S. v. Dandridge, 12 Wheat. 64. Thus a committee of a corporation may orally authorize the treasurer to convey real estate. Hutchins v. Byrnes, 9 Gray, Mass. 367.

⁴⁵ Salem Bank v. Gloucester Bank, 17 Mass. 1; Foster v. Essex Bank, 17 Mass. 479; Minor v. Bank of Alexandria, 1 Pet. 70; Lowell v. Boston and Lowell R. R. 23 Pick. Mass. 24.

⁴⁶ Munn v. Commission Company, 15 Johns. N. Y. 44; Tradesman's Bank v. Astor, 11 Wend. N. Y. 87; Williams v. Mitchell, 17 Mass. 98; Wilkins v. Commercial Bank, 7 Miss. 217; London Soc. v. Hagerstown Bank, 36 Penn. St. 498.

⁴⁷ Trout v. Emmons, 29 Ill. 433.

⁴⁸ Whitehead v. Tuckett, 15 East. 400, 408.

⁴⁹ Batty v. Carswell, 2 Johns. N. Y. 48; Allen v. Ogden, 1 Wash. C. C. 174; Nixon v. Vol. I.—2 Q 321

But although by a special authority the power is limited so as to confine the agent within it, yet there are cases where he may exceed these limits. Whenever one person places another in a certain official situation or relation to himself, or employs a professional agent and delegates to him only limited power, the latter may yet bind his principal to the extent of the power usually incident to the relation in which the agent has been placed. For example, if a factor, broker, or auctioneer be employed by the principal, and he limits their authority by private instructions, still the agent has power to bind his principal to the full extent of his usual authority in dealing with those who have no notice of the limitation.⁵⁰

In certain cases the agent is vested with an authority by his appointment, and secret instructions are also given him with regard to the mode of executing the power; the instructions being confined as to the exercise of the authority, but not intended to abridge it. In these cases, a third person claiming under the executor of the apparent power is not affected by private instructions of which he had no notice.⁵¹

1300. The usages of a particular trade or business, or of a particular class of agents, are included in the power which is bestowed upon them; and, in the construction of those powers, these are considered, not to enlarge the power, but to constitute its extent.⁵²

The authority of an agent includes in it, as an incident, all the powers necessary, proper, or usual, as the means to effectuate the purposes for which it was created.⁵³

But this general authority does not authorize an agent to appoint another person in his place to perform the subject of his agency, *delegata potestas non potest delegari*; ⁵⁴ or, as is otherwise expressed, *vicarius non habet vicarium*, a delegated power cannot be again delegated.⁵⁵ Thus, if a principal employs a broker from the opinion which he entertains of his personal skill and integrity, the broker has no right, without notice, to turn his principal over to another, of whom he knows nothing; and, therefore, a broker cannot, without authority from his principal, transfer consignments made to him, in that character, to another broker for sale.⁵⁶

But a general authority to sell implies authority to employ a broker.⁵⁷

1301. The business to be transacted must be such as the law sanctions; a

Hyserott, 5 Johns. N. Y. 58; Hayden v. Middlesex Turnpike, 10 Mass. 397; Munn v. Commission Co. 15 Johns. N. Y. 44; Rossiter v. Rossiter, 8 Wend. N. Y. 494. The general rule is, that one claiming through a special agent must look to his authority and see what it is. Black v. Shreeve, 2 Beasl. N. J. 455; Payne v. Potter, 9 Iowa, 549; White v. Langdon, 30 Vt. 599.

⁵⁰ Sanford v. Handy, 23 Wend. N. Y. 260, 266; Nickson v. Brohan, 10 Mod. 109; Pickering v. Busk, 15 East, 38, 44; Story, Ag. § 126, and note; 1 Hare & Wall, Sel. Dec. 400; Hough v. Doyle, 4 Rawle, Penn. 291; Shelhamer v. Thomas, 7 Serg. & R. Penn. 106; Baltimore v. Eschbach, 18 Md. 276.

⁵¹ Withington v. Herring, 5 Bingh. 442; Hurlburt v. Kneeland, 32 Vt. 316.

⁵² Story, Ag. § 77. If express directions are given, they supplant the usage and leave the agent no discretion. Hall v. Storrs, 7 Wisc. 253.

⁵³ McAlpin v. Cassidy, 17 Tex. 449; Lumley v. Corbett, 18 Cal. 494; Joyce v. Duplessis, 15 La. Ann. 242; Denman v. Bloomer, 11 Ill. 177; Le Roy v. Beard, 8 How. 451. The last case decides that authority to an agent to sell land includes authority to warrant the title; and this decision is followed in Vanada v. Hopkins, 1 J. J. Marsh. Ky. 293; Peters v. Farnsworth, 15 Vt. 155; Taggart v. Stanberry, 2 McLean, C. C. 543. Contra, Nixon v. Hyserott, 5 Johns. N. Y. 58. An agent to collect a debt cannot take notes or property in payment. Mathews v. Hamilton, 23 Ill. 470; Taylor v. Robinson, 14 Cal. 396.

⁵⁴ 2 Inst. 597; Factor v. Beacon, 5 Bingh. N. c. 310.

⁵⁵ Branch, Max. 38; Broom, Max. 384.

⁵⁶ Cochran v. Irlam, 2 Maule & S. 301, note (a); Solly v. Rathbone, 2 Maule & S. 298; Bocock v. Pavey, 8 Ohio St. 270.

⁵⁷ Northern Railway v. Bastian, 15 Md. 494.

principal cannot, therefore, authorize an agent to do an unlawful act, for no one has a right to empower another to violate the law;⁵⁸ and the agent is not only bound to obey the laws to which he is personally subject, but he must follow those of the place where the business is transacted.⁵⁹ If the agent act pursuant to an unlawful authority, he will not be protected by it, but both he and his principal may be sued; if, for example, Peter authorize Paul to commit a trespass on the person or property of James, Paul will not be protected by the authority, and both he and Peter may be sued by James, in an action of trespass.⁶⁰ And in such case the agent has no remedy against his principal, although at the time the act was committed, it was not known to be a trespass, a promise of indemnity will not be implied; neither, in such case, is there any ground of contribution, if the whole damages recovered for the trespass be levied against the agent,⁶¹ for there is no contribution among joint wrongdoers.⁶²

1302. A *naked authority* is where the principal delegates the power to the agent, wholly for the benefit of the former. In such case the agent must perform the act himself, and cannot delegate his authority to another, because this is a trust reposed in him personally; the maxim in such cases being *delegata potestas non potest delegari*.⁶³

1303. An *authority coupled with an interest* is when it is given to the agent for a valuable consideration, or when it is a part of a security. It is evident that the right of the agent is very different in these several cases; when he has but a naked authority he must act wholly for the benefit of the principal; when, on the contrary, his agency is coupled with an interest, he acts for himself as well as for the principal, and he may appoint a substitute to act in his place; when the agent has but a naked authority, if he were to appoint a substitute there would be no privity between the principal and the substitute; in case of the appointment of a substitute by one who has a power coupled with an interest, there is a privity between the agent, who has an interest, and the substitute. There is still another difference; a naked authority may be revoked, whilst an authority coupled with an interest is irrevocable.⁶⁴

1304. Having considered the nature of the authority of an agent, it is next to be considered how it is to be executed. In the pursuit of this inquiry it will be requisite to examine by whom the authority must be executed; in what manner; and in what time.

1305. An authority is given because confidence is reposed in the personal qualifications of the agent; it must, therefore, be executed by him and no one else, unless there is a power given to the agent to appoint a substitute or sub-agent, or by the usages of trade or the requirements of the law such sub-agent must be appointed. If, for example, the principal should direct his goods to be sold by auction, and, by the laws of the place, the sale can be made by none but a licensed auctioneer, the authority to substitute him in the agency, so far as the sale is concerned, would be implied.⁶⁵ Again, when by the custom of trade a ship broker is usually employed to procure freight, the master of a ship authorized to let the ship on freight has, incidentally, the authority to employ a

⁵⁸ *State v. Matthis*, 1 Hill, So. C. 37.

⁵⁹ *Owing v. Hull*, 9 Pet. 607.

⁶⁰ *Freebrother v. Ansley*, 1 Campb. 343.

⁶¹ *Freebrother v. Ansley*, 1 Campb. 343.

⁶² *Merryweather v. Nixon*, 8 Term, 186.

⁶³ 2 Inst. 597; *Lynn v. Burgovne*, 13 B. Monr. Ky. 400; *Mayer v. McLure*, 36 Miss. 394.

⁶⁴ *Bacon, Abr. Authority*, E. Bouvier, ed. *Hunt v. Rousmaniere*, 8 Wheat. 174; 1 Pet. 1; *Creager v. Link*, 7 Md. 267; *Michigan Ins. Co. v. Leavenworth*, 30 Vt. 11; *Marzion v. Pioche*, 8 Cal. 522.

⁶⁵ *Laussat v. Lippincott*, 6 Serg. & R. Penn. 386.

ship-broker for that purpose.⁶⁶ But in usual cases the rule is that a delegated power cannot be again delegated, *delegata potestas non potest delegari*.

When treating of the number of agents, we considered their power to execute an authority. It will not be required here to say anything further upon the subject.⁶⁷

1306. It is a general rule, in cases of contract, that it must purport upon its face to be the contract of the principal, and his name must be inserted in it and signed to it, and not merely the name of the agent, even though the latter be described as agent in the instrument. In cases of instruments under seal, the agent must do the act in the name of the principal and not in his own name, nor as his proper act, and this seems to have been the ancient rule on this subject in every case.⁶⁸ A deed executed as follows, namely: I, A B, as agent of C D, or signed A B for C D, is the deed of the agent and not of the principal.⁶⁹ For the same reason the deed of a corporation must be sealed with the seal, not of the attorney, but of the corporation.⁷⁰

But when the act can be done *in pais*, or in any other manner than a written instrument under seal, then the act will be construed, if the words used will bear that construction, as most effectually to accomplish the end required by the principal.⁷¹ The proper mode of executing such instruments undoubtedly is to sign the name of the principal, and add, by his agent, thus: A B, (the principal,) by C D, (the agent.) If it appear from the form of the contract that it was the intention to bind the attorney, he will alone be responsible; as where a contract was made by C D, attorney for A B,⁷² or when the agent makes the contract without mentioning the name of his principal; as, if a broker should sell goods and draw upon the buyer for the amount in his own name, in favor of his principal, if the bill should be dishonored, he would be personally liable, unless some special words were used in the bill to prevent it; and this liability would not only extend to third persons, although he was known to be a mere agent, but also to his principal, because upon its face the bill imports a personal liability as drawer in favor of all persons who are or may become parties to it.⁷³

In construing written instruments not under seal, both the body of the instrument and the signature will be considered. Thus, a note reading, I promise, and signed for A B, C D, is the note of A B.⁷⁴ In this case the signature is the signature of A B, and consequently the note purports to be his. And where

⁶⁶ An agent may employ a sub-agent when it is necessary to accomplish the end in view, or is in the usual course of business. Thus he may employ an attorney to manage suits for his principal, a broker to sell stocks, etc. *Appleton v. McGilvray*, 4 Gray, Mass. 522.

⁶⁷ Before, 1278.

⁶⁸ *Combe's case*, 9 Coke, 75, 77; *Comyn. Dig. Attorney*, C. 14; *Clark v. Courtney*, 5 Pet. 319.

⁶⁹ *Bacon, Abr. Leases*, J. 10; *Comyn. Dig. Attorney*, C. 14; *Paley*, Ag. 180, 181; *Story*, Ag. § 148; *Spencer v. Field*, 10 Wend., N. Y. 87; *Copeland v. Mercantile Ins. Co.*, 6 Pick. Mass. 198; *Fowler v. Sherman*, 7 Mass. 14; *Couch v. Ingersoll*, 2 Pick. Mass. 292. The cases where the signature A B for C D is held not sufficient are cases where the *in testimonium* clause does not recite that the principal has thereto set his hand and seal, and do not turn upon the form of the signature alone; for where the deed purports to be the deed of the principal, and is signed for A B, (principal,) C D, (agent,) it will be considered the deed of the principal, for here the intention clearly appears to execute it as his deed. *Martin v. Almond*, 25 Mo. 313; *Deiming v. Bullitt*, 1 Blackf. Ind. 242.

⁷⁰ *Bank of Columbia v. Patterson's admr.* 7 Cranch, 299; *Daman v. Granby*, 2 Pick. Mass. 345; *Flint v. Clinton Co.*, 12 N. H. 433; *Brinley v. Mann*, 2 Cush. Mass. 337.

⁷¹ *Paley*, Ag. 181.

⁷² *Spencer v. Field*, 10 Wend., N. Y. 87. See *Bacon, Abr. Authority*, C. Bouvier, ed.

⁷³ *Bayley*, Bills, 68; *Lefevre v. Lloyd*, 5 Taunt. 749; *Stackpole v. Arnold*, 11 Mass. 27; *Mayhew v. Prince*, 11 Mass. 54.

⁷⁴ *Long v. Coburn*, 11 Mass. 97.

a note reads, I promise, and is signed, for (a corporation) A B, it is the note of the corporation.⁷⁵ So also a note reading, I, A B, Treasurer of, etc., and signed, A B, Treasurer, is the note of the corporation.⁷⁶

It is difficult to reconcile the cases upon this point, but those cited above seem to proceed on the ground that the note purports on its face to be the promise of the principal or for his benefit. But a note reading, I promise, etc., and signed, A B, Treasurer, binds A B personally, for it does not purport to be the note of the company, and the word treasurer is merely a descriptive addition.⁷⁷

1307. It is proper here to note a distinction between the power of an agent and of a deputy in executing an authority in their own names. An agent can bind his principal only when he does an act in the name of the latter. But a deputy, being invested by the law with all the power of his principal, may do a binding act upon the latter and sign his own name;⁷⁸ the case of an under sheriff is an exception to this rule, for he must act in the name of the high sheriff, because the writs are directed to him.⁷⁹

1308. To bind the principal, the authority delegated to the agent must subsist, for if it has been revoked, either expressly or by implication, the agent's power to bind his principal ceases. What will be a determination of the agency will be examined in another place.⁸⁰

1309. The acts of an agent who has performed them without sufficient authority from his principal are not in general binding upon the latter, and he may repudiate them; in that case the agent becomes liable to the persons with whom he dealt, and the principal is discharged. Where the agent had authority and exceeded it, the principal will be bound to the extent of his authority, and the agent for the remainder. But when the principal, upon a full knowledge of all the circumstances of the case, deliberately ratifies the acts, doings, or omissions of the agent, he will be bound by his ratification as fully to all intents and purposes as if he had originally given direct authority in the premises, to those acts, doings, and omissions. By ratification is understood the adoption and approval by one person of the acts of another done in his name or behalf.

1310. *Ratification* may be express or implied. When there is an express confirmation of the transaction there can be little doubt on the subject. When the act of the agent has been under seal, the ratification must also be by seal.⁸¹ In other cases, when the instrument of ratification is in writing, however informal it may be, if it appears that an express ratification was intended, it will be sufficient.

1311. But it is not required that the ratification should be express; it may be implied from the acts of the principal *in pais*. These acts are generally construed liberally in favor of the agent, and but slight or small matters will be sufficient to raise a presumption of ratification; and when his acts can bear no other interpretation, they become conclusive. If, for example, an agent who is employed to buy goods at a certain price should exceed the limit, and the principal, after a full knowledge of the facts, should receive them on his own account without objection, this would be a strong presumption of the ratification; if the goods had been bought on credit, and he gave his notes for the amount

⁷⁵ *Emerson v. Providence Co.*, 12 Mass. 237.

⁷⁶ *Brockway v. Allen*, 17 Wend. N. Y. 40; *Mann v. Chandler*, 9 Mass. 335.

⁷⁷ *Haverhill Ins. Co. v. Newhall*, 1 All. Mass. 130.

⁷⁸ *Craig v. Radford*, 3 Wheat. 594; *Parker v. Kett*, Salk. 95. But see 9 Coke, 48.

⁷⁹ Salk. 95.

⁸⁰ See beyond, 1367.

⁸¹ *Bloodgood v. Goodrich*, 9 Wend. N. Y. 68; 12 Wend. N. Y. 565; *Hanford v. McNair*, 9 Wend. N. Y. 58.

of the purchase money, this would be conclusive; and if, afterward, he should sell the goods so bought, it would be impossible for him to resist the presumption.⁸²

1312. The bringing an action by the principal against a third person, to compel the performance of an unauthorized act of the agent, will be considered as a ratification; as, when the agent sold goods without authority, or below the limited price, and the principal brought suit against the purchaser to recover the price;⁸³ or if a factor should sell goods for a price below the limits, and afterward the principal should sue him for the money received by him upon such sale, that would amount to a ratification.⁸⁴

1313. Silence itself will sometimes operate as a ratification, particularly when the principal is bound to speak; thus, receiving notice of the acts of an agent, without objection, will be a ratification, unless the notice came too late to prevent the effect of those acts;⁸⁵ and long acquiescence, without objection, will have the same effect: where an agent, without authority, compromised a debt of his principal, who, after a full knowledge of the fact, made no objection, and acquiesced in the act for a length of time, he was, therefore, held bound by it.⁸⁶

Whether silence operates as a presumptive proof of ratification frequently depends upon the particular relations between the parties, the habits of business, and the usages of trade, which have always an important bearing on the construction of commercial contracts. Between merchants and their correspondents, it is the duty of one party, receiving a letter from another, to answer the same within a reasonable time; and if he does not, it is generally presumed that he admits the propriety of the acts of his correspondent, and confirms and adopts them; if, therefore, the principal, having received information, by a letter from his agent, of his acts, touching the business of his principal, does not express his dissent to the agent within a reasonable time, it is presumed that he approves of his acts by his silence. Indeed, this seems so natural a consequence that perhaps most civilized states have adopted the same rule.⁸⁷

1314. A ratification will also be inferred from the mere habit of dealing between the parties; if a broker has been accustomed to settle losses on policies in a particular manner, without any objection being made, or with the silent approbation of his principal, and he should afterward settle other policies in the same manner, to which no objection should be made within a reasonable time, a just presumption would arise of an implied ratification, even though the principal might, in some other cases, have objected to this mode of settlement, for if he did not agree to such settlement, he should have declared his dissent.⁸⁸

⁸² Paley, Ag. Lloyd, ed. 113, 115; Story, Ag. § 253; Clark's Ex'rs. v. Van Reimsdyk, 9 Cranch, 153; Ruggles v. Washington County, 3 Mo. 496; Bell v. Cunningham, 3 Pct. 81; Shiras v. Morris, 8 Cow. N. Y. 60; Thurston v. James, 6 R. I. 103. A ratification will be inferred where the principal accepts the benefits of the acts, as where he receives the price for an unauthorized sale, or receives and uses an article purchased without authority. Evans v. Chicago R. R., 26 Ill. 189; Pierce v. O'Keefe, 11 Wisc. 180; Exum v. Brister, 35 Miss. 391; Reid v. Hibbard, 6 Wisc. 175; Powell v. Gossom, 18 B. Monr. Ky. 179.

⁸³ Gaines v. Acre, 1 Ala. 141; Hampshire v. Franklin, 16 Mass. 76; Corser v. Paul, 41 N. H. 24; Walker v. Mobile R. R., 34 Miss. 245.

⁸⁴ Paley, Agency, Lloyd, ed. 172, 173.

⁸⁵ Shaw v. Nudd, 8 Pick. Mass. 9; Amory v. Hamilton, 17 Mass. 103; Forsyth v. Day, 46 Me. 196; Brigham v. Peters, 1 Gray, Mass. 139.

⁸⁶ Armstrong v. Barnwell, 2 Johns. Cas. N. Y. 424; Williams v. Merritt, 23 Ill. 623.

⁸⁷ 1 Emerigon, Assur. c. 5, § 6; Dig. 14, 6, 16; Casaregis, Disc. 102, n. 54; Dalloz, Dict. Ratification, art. 1, n. 9. It may be said generally that where an agent duly appointed exceeds or violates his instructions, the principal must repudiate his acts as soon as they come to his knowledge or he will be bound. Law v. Cross, 1 Black, 533; Ward v. Williams, 26 Ill. 447; Wright v. Boynton, 37 N. H. 9.

⁸⁸ Paley, Ag. Lloyd, ed. 280.

A ratification must be made with full knowledge of all the particulars, for it will not bind the principal if made under a mistake of fact;⁹⁰ and the third party to the contract cannot set up acts of ratification unless he has actually relied on them and has been prejudiced by so doing.⁹⁰

1315. *The effect of ratification* may be different as it affects different acts, and these acts may be classed into those where the party acting had no authority, those where he had authority and exceeded it, and those which are void and voidable; and lastly, we shall consider the extent and time of ratification.⁹¹

1316. In cases when the party had no authority whatever to act with the goods or property, and he has used them and converted them into money, the owner may treat him as a trespasser, or, waiving the tort, consider him as his agent and ratify his acts. In this, as in every other case of confirmation or ratification, the act of the owner will be a renunciation of all other rights he had except the agency, and will render that valid which before was voidable.⁹² It is a maxim that subsequent assent, given to what has been already done, has a retrospective effect, and is equivalent to a previous command: *omnis ratihabitio retrò trahitur, et mandato priori æquiparatur*;⁹³ an act of an agent, which, if authorized, would have given an action to a third person for damages against the principal when subsequently ratified by him, will give the same right against him as if it had been so authorized; for the ratification relates back to the time of the inception of the transaction, and has a complete retroactive effect.⁹⁴

It may be laid down as a well-known rule of law that an act done for another by a person not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal, if subsequently adopted and ratified by him. In this case the principal is bound by the act, whether it be for his detriment or his advantage, and whether it be founded on a tort or contract, to the same extent and with all the consequences which follow from the same act if done by previous authority.⁹⁵

1317. But there are some acts of an unauthorized person which cannot be ratified so as to give validity against third persons by relation, because that would operate injustice toward them. The following are examples:

A notice to quit by a person having no authority to give it cannot by a subsequent ratification be made valid to determine a lease, and the reason assigned for this is, that on receiving such notice the tenant is entitled to know with certainty whether he will or will not be required to quit.⁹⁶

A demand of a debt by an unauthorized person cannot be ratified by the creditor so as to take away the right of the debtor to plead a prior tender, because such unauthorized person had no right to give a discharge.⁹⁷ For the

⁹⁰ *Tidrick v. Rice*, 18 Iowa, 214; *Dodge v. McDonnell*, 14 Wisc. 553; *Woodbury v. Larned*, 5 Minn. 339; *Mathews v. Hamilton*, 23 Ill. 470; *Seymour v. Wyckoff*, 10 N. Y. 213; *Pittsburg R. R. v. Gazzam*, 32 Penn. St. 340.

⁹¹ *Doughady v. Crowell*, 3 Stockt. N. J. 201.

⁹² To enable a principal to ratify his agent's act, the act must be done avowedly for and on account of the principal, and must purport to be the act of the principal. *Commercial Bank v. Jones*, 18 Tex. 811.

⁹³ *Wood v. Carpenter*, 4 Wend. N. Y. 219; *Odiorne v. Maxcy*, 13 Mass. 178, 182; 15 Mass. 39; *Frothingham v. Haley*, 8 Mass. 68.

⁹⁴ *Coke*, Litt. 207, a. 258, a.

⁹⁵ *Rogers v. Kneeland*, 10 Wend. N. Y. 248; *Brock v. Jones*, 16 Tex. 461. But the ratification cannot relate back so as to impair the rights of third parties acquired after the act and before the ratification. *Taylor v. Robinson*, 14 Cal. 396; *Fiske v. Holmes*, 41 Me. 441.

⁹⁶ *Wilson v. Tummon*, 6 Scott, n. r. 894, 904; *Moore v. Pendleton*, 16 Ind. 481.

⁹⁷ *Right ex dem. Fisher v. Cuthell*, 5 East, 491; *Doe v. Walters*, 10 Barnew. & Cr. 626.

⁹⁸ *Coles v. Bell*, 1 Campb. 478, note; *Coore v. Callaway*, 1 Esp. 115.

same reason a demand by a stranger, of goods, will not be evidence of a conversion,⁹⁸ and the demand of payment of a bill of exchange or a promissory note by such a stranger will not constitute a good demand upon the party so as to make him liable for damages for his default,⁹⁹ although in both instances the acts were ratified by the principal.

1318. It not unfrequently happens that an agent, having a special authority, exceeds the powers given to him, either by design or through inadvertence; in these cases the principal is bound to the extent of his authority, but no further. If, being fully aware of all the circumstances, he ratifies the act of the agent, he will be as fully bound as if he had originally given him authority, and he will be entitled to all the advantages resulting from the agent's acts;¹⁰⁰ but if the ratification be made by the principal without such knowledge, it will not be obligatory upon him, whether the absence of such knowledge arise from the designed or undesigned concealment or misrepresentation of the agent, or from his mere inadvertence.¹⁰¹

1319. When the agent has appointed a sub-agent without authority, and the principal afterward ratifies the act of the sub-agent, such an act will have the effect to confirm the acts of the agent in the appointment.¹⁰²

1320. Before we proceed to examine the effect of ratification on acts void or voidable, it will be proper to ascertain what kind of acts may be classed as void and what are voidable.

1321. A *void act* is one which has no force and effect, and life can never be infused into it; such as is declared void by statute, or because it is immoral or against public policy. An act of this kind can never be confirmed; *quod ab initio non valet in tractu temporis non convalescit*, that which was originally void does not by lapse of time become valid. But there are acts of an agent which are void only conditionally; they are void as to the principal if he does not sanction them, but they are valid as to him, at least, and frequently as regards others, if he confirms them. When we speak of void acts in this connection, acts of the first class only are intended.¹⁰³

The principal cannot ratify an act if he had no power to do the act when it was done.¹⁰⁴

1322. A *voidable act* is one which has some force or effect, but which, in consequence of some inherent quality, may be legally annulled and avoided.

When an act is void in the sense above given to the word, it is clear it cannot be ratified; but if it is merely voidable, it may be ratified by the principal, and such ratification shall have effect as if it had been originally authorized; but it must be remembered that it must be ratified by the same formality which would have been required in the original authority. If the act of the agent has been by deed, the ratification must be under seal.

1323. The moment the ratification is made upon deliberation, and knowledge

⁹⁸ *Solomon v. Dawes*, 1 Esp. 83.

⁹⁹ *Freeman v. Boynton*, 7 Mass. 483; *Bank of Utica v. Smith*, 18 Johns. N. Y. 230.

¹⁰⁰ *Den v. Wright*, Pet. C. C. 64; *Vanhorne v. Frick*, 6 Serg. & R. Penn. 90; *Courcier v. Ritter*, 4 Wash. C. C. 549; *Cox v. Robinson*, 6 Ala. 91; *Towle v. Stephenson*, 1 Johns. Cas. N. Y. 110.

¹⁰¹ *Bell v. Cunningham*, 3 Pet. 69; *Copeland v. Merchants' Ins. Co.* 6 Pick. Mass. 202; *Harsfall v. Fauntleroy*, 10 Barnew. & C. 755.

¹⁰² *Paley*, Ag. Lloyd, ed. 171; *Bean v. Drew*, 15 La. Ann. 461.

¹⁰³ A forged signature to a note may be ratified and adopted so as to bind the party whose name is forged. *Greenfield Bank v. Crafts*, 4 All. Mass. 447. So of a forged power of attorney. *Garrett v. Gouter*, 42 Penn. St. 143. See *Ducongé v. Forgay*, 15 La. Ann. 37; *Whiteford v. Munroe*, 17 Md. 135. Contra, *Ferry v. Taylor*, 33 Mo. 323.

¹⁰⁴ *McCracken v. San Francisco*, 16 Cal. 591.

of the facts and circumstances by the principal, it becomes, *eo instanti*, obligatory, and cannot be revoked or recalled by the principal.¹⁰⁵

As the act of the agent is a unit, the principal must ratify the whole or none; he cannot confirm a part, and reject the other, and if he attempts to do so, his act will be a ratification of the whole.¹⁰⁶

1324. The rights to which the principal is entitled as such arise from obligations due to him by the agent or by third persons.

1325. The principal has a right to call upon his agent at all times for an account in relation to the business of the agency. It is an implied agreement, in every contract of agency, that the agent shall keep a clear account, not only of his disbursements, but also of his receipts,¹⁰⁷ and this should contain not only what has been received, but also all increase which has been made from the property.¹⁰⁸ The account must be made without suppression, concealment or overcharge.¹⁰⁹

1326. When the agent violates his obligations to his principal, either by exceeding his authority, or by positive misconduct, or by mere negligence or omission in the discharge of the functions of his agency, or in any other manner, and any loss or damage falls on his principal, the latter will be entitled to full indemnity.¹¹⁰ But he is entitled to nothing more. In an action against an attorney for not charging the defendant in execution, where the debt was £3000, the plaintiff was held not to be entitled to the whole amount of the plaintiff's original claim, but to what the jury found to be full indemnity, £500, that being the amount which could have been recovered from the original defendant.¹¹¹

The agent is not liable for remote consequences, but only the immediate consequences of his neglect, *e. g.*, he is not liable for the profits the principal might have made had his instructions been followed, but only for the loss he has actually suffered.¹¹² And he is responsible only for losses actually sustained, not for losses which were rendered possible by his neglect. Thus if he neglects to insure a ship, and the ship arrives safely, there is no loss.¹¹³

1327. In those cases where both the principal and agent may bring an action against a third person for any matter relating to the agency, the principal has a right to supersede the agent by suing in his own name; and he may by his own intervention intercept, suspend, or extinguish the right of the agent under the contract.¹¹⁴ But this rule is limited by considerations of reciprocal justice and equity. When the agent has acquired a lien or other claim on property in his hands, and he sells it, his right is extended to the price for which

¹⁰⁵ *Smith v. Cologan*, 2 Term, 189, note; *Clarke v. Van Reimsdyk*, 9 Cranch, 153; *Bell v. Byerson*, 11 Iowa, 233.

¹⁰⁶ *Smith*, Mer. Law. 60; *Ferguson v. Carrington*, 9 Barnew. & C. 59; *Menkens v. Watson*, 27 Mo. 163; *Newall v. Hurlbert*, 2 Vt. 351.

¹⁰⁷ *White v. Lady Lincoln*, 8 Ves. Ch. 369; *Morgan v. Lewes*, 4 Dow, Parl. Cas. 52; *Eaton v. Welton*, 32 N. H. 352.

¹⁰⁸ *Brown v. Litton*, P. Will. Ch. 141; *Diplock v. Blackburn*, 8 Campb. 43; *Denson v. Stewart*, 15 La. Ann. 456. When the agent fraudulently appropriates money of his principal, he is liable for interest. *Hill v. Hunt*, 9 Gray, Mass. 66.

¹⁰⁹ *Paley*, Ag. 48. For a failure to keep and render accounts, an agent is liable to the extent of the actual damage suffered by the principal thereby. Such failure may be ground for dismissal, but unless damage has actually come to the principal, it will not deprive the agent of his compensation for what he has done. *Sampson v. Somerset Works*, 6 Gray, Mass. 120.

¹¹⁰ *Paley*, Ag. 7, 71, 74.

¹¹¹ *Russell v. Palmer*, 2 Wils. 325. See *Purviance v. Angus*, 1 Dall. 180.

¹¹² *Bell v. Cunningham*, 3 Pet. 69; *Smith v. Condry*, 1 How. 28.

¹¹³ *De Tastet v. Crousillar*, 2 Wash. C. C. 132.

¹¹⁴ *Paley*, Ag. 362; 1 *Livermore*, Ag. 226.

such goods were sold.¹¹⁵ To entitle the agent to this privilege, he must give notice of it to the purchaser before he has paid the principal, or before he has obtained a right of set-off against him.¹¹⁶

1328. When a contract is made by an agent with a third person in the name of his principal, the latter may enforce it by action. But to this rule there are the following exceptions:

When the instrument is under seal, and it has been exclusively made between the agent and the third person; as, for example, a charter party or bottomry bond. In this case the principal cannot sue on it.¹¹⁷

When an exclusive credit is given to and by the agent, and therefore, the principal cannot be considered in any manner a party to the contract, although he may have authorized it, and be entitled to all the benefits arising from it. The case of a foreign factor buying and selling goods is an example of this kind; he is treated, as between himself and the other party, as the sole contractor, and the real principal cannot sue nor be sued on the contract. This, it has been well observed, is a general rule of commercial law, founded upon the known usages of trade, and it is strictly adhered to for the safety and convenience of foreign commerce.¹¹⁸

When the agent has a lien or claim upon the property bought or sold, or upon its proceeds, as above explained.

1329. But contracts are not unfrequently made without mentioning the name of the principal; in such case he may avail himself of the agreement, for the contract will be treated as that of the principal as well as of the agent,¹¹⁹ for it is a rule that when the principal can trace his property into the hands of his agent or factor, whether it be the identical article which first came to the hands of the factor, or other property purchased for the principal by the factor with the proceeds, he may follow it, either in the hands of the factor, or of his legal representatives, or of his assigns, if he should become insolvent or bankrupt.¹²⁰

1330. Third persons are also liable to the principal for any tort or injury done to his property or rights in the course of the agency.¹²¹

Where the agent has been also a party to the tort, he and the third party are liable to the principal jointly and severally.¹²² If the agent is not a party, the third party is liable both to the agent and principal. Thus, if the agent tortiously converts the property of the principal by selling or pledging it, the principal may sue the vendee or pledgee for the conversion. And whether the agent has been privy to the tort or not, the principal may generally sue the third party for the tort, or waive the tort and sue for the price.

1331. *The liabilities of the principal* are to his agent or to third persons.

1332. The principal is bound to reimburse his agent for all expenses he may have lawfully incurred about the agency. This will be more fully examined when we come to consider the rights of agents.

1333. The principal is liable to the agent for all damages he may have sustained in the course of the agency; but to give rise to this obligation it is necessary that the agent should have sustained some loss on account of the agency, *ex*

¹¹⁵ 3 Chitty, Com. Law, 211; Smith, Merc. Law, 77.

¹¹⁶ Drinkwater v. Goodwin, Cowp. 251.

¹¹⁷ Shack v. Anthony, 1 Maule & S. 573; Story, Ag. § 422; United States v. Parmele, 1 Paine, 1 C. C. 252.

¹¹⁸ Story, Ag. § 423; Thompson v. Davenport, 9 Barnew. & C. 87; Patterson v. Gandassequi, 15 East, 62; Addison v. Gandassequi, 4 Taunt. 574; Smith, Merc. Law, 66.

¹¹⁹ Story, Ag. §§ 109, 111, 403, 410, 417, 440; Paley, Ag. 21, 22; Cushing v. Rice, 46 Me. 303; Ford v. Williams, 21 How. 287.

¹²⁰ Veil v. Admr. of Mitchell, 4 Wash. C. C. 105, 106.

¹²¹ Paley, Ag. 363; Story, Ag. § 436.

¹²² Hodge v. Combs, 1 Black, 192.

causa mandati, and that the loss should not have been caused by the agent's fault.¹²³

1334. He is also bound to pay the agent the commissions agreed upon, or according to the usages of trade, except in cases of mandates or gratuitous agencies.¹²⁴

The compensation of commercial agents is often called a commission; that is, a percentage upon the amount of business or money received. The amount of commission, if not expressly stipulated, will be governed by the usages of the particular trade at the place of agency. Ordinarily the whole duty of the agent must be completed before the right to any commission attaches, unless the contract can be divided.¹²⁵

1335. The principal is bound toward third persons to fulfil all engagements made by the agent for and in the name of his principal, and which come within the scope of his authority; because what is done by an agent properly authorized is the act of the principal, *qui facit per alium facit per se*; and besides, it is only justice that he who reaps the benefit of a contract should be bound to fulfil his part of the engagement. But to this general rule there are exceptions, some of which will here be noticed:

If the principal and agent are both known and the credit is given exclusively to the latter, the principal will not be liable.

When the purchase of goods is made by a foreign factor, the credit given to him is exclusive, and the principal is not responsible.

And even in the case of a domestic factor, when the credit is given exclusively to him, the principal will not be bound.¹²⁶

When the contract is made in the name of the agent and the name of the principal is not disclosed at the time, and in the mean time he has settled with the agent without any suspicion of his own personal liability; or if, by the state of the accounts between them, the agent appeared to be in debt to the principal, the latter will not be bound.¹²⁷

When the vendor by his acts has induced the principal to believe he would not be looked to for payment, the latter will be discharged; as, where he gave the agent a receipt, or took a negotiable security from the agent payable at a future day.¹²⁸

Another exception arises from the form of the contract, for although the act may have been authorized, yet the principal can neither sue nor be sued; as, for example, when the contract is under seal and made in the name of the agent only.¹²⁹

1336. The principal is liable to third persons in consequence of the acts of his agent, upon the obvious maxim already mentioned, that he who acts by another acts by himself; *qui facit per alium facit per se*. In the following cases the acts of the agent, or of others toward the agent, bind the principal:

A delivery of goods to an agent is a delivery to the principal; a delivery to the servant of a carrier, in the course of his employment, is a delivery to the carrier himself.¹³⁰

Payment made by a third person to an agent, in the course of his employment, is a payment to the principal.¹³¹

¹²³ Elliott v. Walker, 1 Rawle, Penn. 126; D'Arcy v. Lyle, 5 Binn. Penn. 441. See Ramsay v. Gardner, 11 Johns. N. Y. 439; Stocking v. Sage, 1 Conn. 519.

¹²⁴ Story, Ag. § 323; Story, Bailm. 153, 154, 196-201.

¹²⁵ McGavock v. Woodlief, 20 How. 221.

¹²⁶ Story, Ag. § 448; Paley, Ag. Lloyd, ed. 245, 246.

¹²⁷ Thompson v. Davenport, 9 Barnw. & C. 88; Paley, Ag. by Lloyd, 246.

¹²⁸ Story, Ag. § 449

¹²⁹ Before, 1328.

¹³⁰ Smith, Merc. Law, 69; Abbott, Ship. 90-99.

¹³¹ Paley, Ag. by Lloyd, 298.

A tender to an authorized agent is a tender to the principal.¹³²

Notice to an agent, in the course of his employment, is a notice to the principal.¹³³

The representations, declarations, and omissions of an agent, in the course of the agency, are deemed a part of the *res gestæ*, and binding upon the principal.¹³⁴ But the admission of the agent cannot always be assimilated to the admission of the principal. The party's own admission is binding upon him under all circumstances; but the declarations or admissions of his agent bind him only when they are made during the continuance of the agency, in regard to the transaction then depending, *et dum fervet opus*.¹³⁵

A demand of goods pawned to the principal, made of his agent, and a tender to him of the money due on them, will, upon the refusal of the agent, if usually entrusted to deliver up such property, amount to evidence of conversion by his employer.¹³⁶

1337. The principal is civilly liable to third persons for the torts, misfeasances, negligence, or omission of duty of his agent in the course of his employment, although the principal did not authorize, or justify, or participate in, or indeed know of such misconduct, or even if he forbade or disapproved of it; the rule *respondet superior* being applicable in these cases. And this rule is founded in justice and equity. The principal holds out his agent as competent and fit to be trusted, and by his conduct warrants his fidelity and good behavior in all matters relating to the agency.¹³⁷ A civil action may, therefore, be sustained against the principal for negligence of his agent in driving a carriage,¹³⁸ or navigating ships or steamboats,¹³⁹ or for negligently packing goods to be carried by the master as a common carrier.¹⁴⁰

The principal is also liable for the acts of servants or agents who are subordinate to other servants or agents if the subordinates are in his employment.¹⁴¹ This liability, however, does not extend so far as to render an owner of property liable for acts or neglects of the servants of a contractor who is performing work upon the property,¹⁴² with the exception perhaps that in cases where the

¹³² Anon. 1 Esp. 349.

¹³³ Story, Ag. § 140; Ingalls v. Morgan, 10 N. Y. 178. This rule is the subject of much discussion and of nice distinctions in the various branches of mercantile law.

¹³⁴ Story, Ag. §§ 134, 137; 1 Greenleaf, Ev. § 113.

¹³⁵ Doe v. Hawkins, 2 Q. B. 212; Sauniere v. Wode, 3 Harr. N. J. 299.

¹³⁶ Bacon, Abr. *Master and Servant*, K; Alexander v. Southey, 5 Barnw. & Ald. 247; and see 2 Saund. 47 e, f, g; 2 Salk. 441.

¹³⁷ Story, Ag. § 452. See Lane v. Cotton, 12 Mod. 490; Paley, Ag. by Lloyd, 294, 301; Bacon, Abr. *Master*, etc. K; Hern v. Nichols, 1 Salk. 289. Mr. Hammond is of a different opinion; he says: "The ground of the principal's liability cannot be that he has selected an agent more or less unworthy, and placed him in a situation which enables him to become an instrument of mischief to his neighbors, because this would hold him responsible, not alone for acts done by the other in his capacity *quatenus* agent, but even for a wilful default." Hammond, Nisi P. 81. And Blackstone assigns this reason, that "the wrong done by the servant is looked upon in law as the wrong of the master himself; and it is a standing maxim that no man shall be allowed to make any advantage of his own wrong." 1 Sharswood, Blackst. Comm. 432. But this cannot be the case where the master has forbidden the act, and yet he is as liable as when he has co-operated in the wrong.

¹³⁸ Wayland v. Elkins, Holt, N. P. 227; Michael v. Alestree, 2 Lev. 172.

¹³⁹ Paley, Ag. Lloyd, ed. 297.

¹⁴⁰ 1 Wils. 282.

¹⁴¹ Stone v. Codman, 15 Pick. Mass. 297; Earle v. Hall, 2 Metc. Mass. 353; Commercial Bank v. Jones, 18 Tex. 811; Rider v. Smith, 3 Term, 766; Randleson v. Murray, 8 Ad. & E. 109; McKenzie v. McLeod, 10 Bingh. 385; Sadler v. Henlock, 4 Ell. & B. 570; Quarman v. Burnett, 6 Mees. & W. Exch. 499.

¹⁴² Laughler v. Pointer, 5 Barnw. & C. 547; Rapson v. Cubitt, 9 Mees. & W. Exch. 710; Knight v. Fox, 5 Exch. 721; Overton v. Freeman, 11 C. B. 867; Peachey v. Rowland, 13 C. B. 182; Stevens v. Armstrong, 7 N. H. 435; De Forest v. Wright, 2 Mich. 368; Hilliard

principal or first agent is clothed with a public trust or duty in the performance of the work which does not admit of delegation, the principal will be liable for acts of a servant of a contractor or sub-contractors in the case of railroads, commissioners of public works, etc.¹⁴³

The liability of the principal to third persons may arise, where the injury committed is not within the scope of the ordinary business of the principal, when it has been committed by previous command, or it has afterward been assented to, adopted, or ratified by him. For example, if the principal should direct his agent to commit a trespass, or to make a conversion of the property of a third person, or he should subsequently ratify or adopt the act when done for his benefit, he would be liable as an original trespasser.¹⁴⁴

The liability of the principal for the torts, misfeasance, and negligence of his agent is confined to such of these acts as occur in the course of his agency; for it is not just nor reasonable that he should be held responsible for acts beyond the agency, unless he has expressly authorized them, or adopted them afterward for his own use and benefit; as, for example, if a servant, while driving his master's carriage, should willfully or maliciously run against another and do an injury, or run down a person on the road, or, coming down from his box, commit a battery upon another, the principal would not be responsible.¹⁴⁵

It has of late years become an important question whether and to what extent a principal is liable to an agent for injuries suffered from the misfeasance or negligence of another agent. Where the two agents are employed in the same business, it is held that the principal is not liable; as, where one employee on a railroad is injured by the carelessness of another employee occupying the same or a similar position.¹⁴⁶

v. Richardson, 3 Gray, Mass. 349; *Commercial Bank v. Jones*, 18 Tex. 811; *Stickney v. Munroe*, 44 Me. 195. This subject has given rise to some conflicting decisions, especially in cases where the owner of real estate employs a person to do some work upon or relating to it, in the course of which a party is injured through some neglect or wrong-doing of the laborers actually engaged in the work; as, for example, the owner of a house engages a carpenter to build an addition; he employs a mason to do the mason's work; he employs subordinates, who leave a pile of bricks in the street, and a passer-by is injured by falling upon them. The question of liability is, in many cases, complicated by considerations of the liability of the owner for the construction or maintenance of nuisances upon his premises; but so far as the liability arises out of the relation of principal and agent, it extends only to acts or neglects by those who are his servants, subject to his immediate control, direction, and supervision, and with whom the relation of master and servant exists as distinguished from that of contractor. The control need not, in fact, be exercised by the owner; the actual direction of the work may be entrusted to sub-agents or overseers, in various descending degrees of authority, if the power of supervision and control remain with the first party or owner, he is liable. If, however, the agency of a contractor intervenes, he becomes the principal, and parties injured must look to him for redress. The test question is, Was the hand which committed or omitted the act the servant of the owner or of some intermediate principal? If the latter, the owner is not liable. *Hilliard v. Richardson*, 3 Gray, Mass. 349; *Stevens v. Armstrong*, 7 N. Y. 435; *De Forest v. Wright*, 2 Mich. 368; *Potter v. Seymour*, 4 Bosw. N. Y. 140; *Scammon v. Chicago*, 25 Ill. 424. The case of *Bush v. Steinman*, 1 Bos. & P. 404, which extends the liability of the owner or first principal much further than this rule, although supported by *Wiswall v. Brinson*, 10 Ired. No. C. 554; *Stone v. Cheshire R. Corp.* 19 N. H. 427, and referred to with approbation in some other cases, is not considered to be law, having been expressly overruled in several English and most of the American cases, so far, at least, as it is based upon the doctrine here examined.

¹⁴³ *Lowell v. Boston R. R.*, 23 Pick. Mass. 24; *Stone v. Chelshire R. Corp.* 19 N. H. 427; *Lesh v. Wabash Nav. Co.*, 14 Ill. 85; *Batty v. Duxbury*, 24 Vt. 155; *Bailey v. Mayor*, etc. of New York, 3 Hill, N. Y. 531; *Harris v. Baker*, 4 Maule & S. 27.

¹⁴⁴ 4 Coke, Inst. 317; Comyn, Dig. *Trespass*, C. 1; *Sands v. Child*, 3 Lev. 352; *Jones v. Hart*, 1 Ld. Raym. 738; *Britton v. Cole*, 1 Salk. 408; *Exum v. Brister*, 35 Miss. 391.

¹⁴⁵ *Smith*, Mer. Law, 69; *M'Manus v. Crickett*, 1 East, 106.

¹⁴⁶ *Russell v. Hudson R. R.* 17 N. Y. 134; *Cook v. Parham*, 24 Ala. n. s. 21.

But where the agent injured occupies an inferior position and is under the control of the agent causing the injury, the principal is held liable.¹⁴⁷

1338. *An agent's rights* may be divided into those against his principal and those against third persons.

1339. An agent is entitled to require from the principal a just compensation for his services, when faithfully performed, in execution of a lawful agency, unless such services are entirely gratuitous or the agreement between the parties repels such a claim; this compensation, which is frequently called a commission, is regulated either by particular agreement, or by the usage of trade, or the presumed intention of the parties.¹⁴⁸ Besides the ordinary commissions, there is sometimes allowed an extraordinary compensation, either by usage or the positive agreement of the parties; such as the commission called a commission *del credere*, which is an extra compensation paid to a factor or commission merchant in consideration of his undertaking to become responsible for the solvency of the buyer and the prompt payment of the purchase money for goods of the principal which he has sold.¹⁴⁹

In general, commissions are not due until all the services are performed, though to this rule there are exceptions;¹⁵⁰ and gross negligence, gross misconduct, or gross unskilfulness, is a forfeiture of commissions;¹⁵¹ and the right to commissions will also be gone if there has been fraud in the transaction of the business of the agency, or its object has been illegal.¹⁵²

1340. The agent is also entitled to be reimbursed all his just advances, expenses, and disbursements made in the course of the agency on account of and for the benefit of the principal; and also to be paid interest upon such advances whenever, from the nature of the business, or the usages of trade, or the particular agreement of the parties, it may be fairly presumed to have been stipulated for or due to the agent.¹⁵³

1341. The agent is not only entitled to be reimbursed all moneys advanced by him, with the interest, but he is also to be recompensed for any loss he may have sustained, without any fault of his own, while engaged lawfully in the performance of the business of the agency;¹⁵⁴ as, where an agent, in consequence of a deception practiced upon him by his principal, and in pursuance of orders, innocently makes a false representation of the quality of the goods of the principal, and on that account is compelled to pay damages to a purchaser, he will be entitled to a full remuneration from his principal.¹⁵⁵

Besides the personal remedies which an agent has to enforce his claims against his principal for his commissions and advancements, he has a lien upon the personal property of his principal in his hands.

In its most extensive signification, the term *lien* includes every case in which real or personal property is charged with the payment of a debt or duty, every such charge being denominated a lien on the property. In a more confined sense,

¹⁴⁷ Little *Miami R. R. v. Stevens*, 20 Ohio, St. 415; *Chamberlain v. M. & M. R. R.* 11 Wisc. 238.

¹⁴⁸ *Bower v. Jones*, 8 Bingh. 65; *Bradford v. Kimberly*, 3 Johns. Ch. N. Y. 431; *Welsh v. Duser*, 3 Binn. Penn. 329; *Gregory v. Mark*, 3 Hill, N. Y. 380; *Tavebaugh v. Reed*, 5 T. B. Monr. Ky. 179; *Miller v. Livingston*, 1 Caines, N. Y. 349.

¹⁴⁹ Paley, Ag. Lloyd, ed. 40, 41, 100.

¹⁵⁰ See *Hammond v. Holiday*, 1 Carr. & P. 384; *Broad v. Thomas*, 7 Bingh. 99; *Read v. Rann*, 10 Barnew. & C. 438.

¹⁵¹ Paley, Ag. by Lloyd, 104, 105.

¹⁵² Story, Ag. §§ 330, 333, 334.

¹⁵³ 2 Livermore, Ag. 11-23; Story, Ag. § 335; Story, Bailm. § 196; Smith, Merc. Law, 56; *Meech v. Smith*, 7 Wend. N. Y. 315; *Delaware Ins. Co. v. Delaunie*, 3 Binn. Penn. 295; *Carlton v. Bragg*, 15 East, 223.

¹⁵⁴ *D'Arcy v. Lyle*, 5 Binn. Penn. 441.

¹⁵⁵ *Southern v. How*, J. Bridgm. 126; 2 Moll. Ch. Ir. 330.

it is the right of detaining the property of another until some claim be satisfied. As the nature of a lien is considered elsewhere, a further examination here is not requisite.

1342. The rights of agents against third persons arise, first, on contracts made between them and such third persons; and, secondly, in consequence of torts or injuries committed by the latter.

1343. When the contract is in writing, and made expressly with the agent, and it imports to be a contract personally with him, although he may be known to act as agent, he will be entitled to recover; as, for example, when a promissory note is given to the agent as such, for the benefit of his principal, and the promise is to pay the money to the agent *eo nomine*.¹⁵⁶

1344. When the agent is the only known or ostensible principal, and therefore is, in contemplation of law, the real contracting party. If an agent sell goods of his principal in his own name, and as if he were the owner, he is entitled to sue the buyer for the price in his own name, although the principal may also sue.¹⁵⁷ And, on the other hand, if he buys, he may enforce the contract by action.

1345. When, by the usages of trade, the agent is authorized to act as owner or as a principal contracting party, although his character as agent is known, he may enforce his contracts by action. For example, an auctioneer who sells goods for others may maintain an action for the price, because he has a possession, coupled with an interest, in the goods; and it is a general rule, that whenever an agent, though known as such, has a special property in the subject matter of the contract, and not a bare custody, or where he has acquired an interest and has a lien upon it, he may sue upon the contract. But this right to bring an action by agents is subordinate to the right of the principal, who may, unless in particular cases, where the agent has a lien or some other vested right, bring a suit himself, and suspend or extinguish the right of the agent.¹⁵⁸

1346. An agent may maintain an action of trespass or trover against third persons for any torts or injuries to the goods which he holds in his possession as agent.¹⁵⁹

1347. When an agent has been induced by the fraud of a third person to sell or buy goods for his principal, and he has sustained a loss, he may maintain an action against such third person for such wrongful act, deceit, or fraud.¹⁶⁰

1348. *Agents are liable to their principals and to third persons.*

1349. The agent is bound to obey the instructions of his principal, and a voluntary violation of them, by exceeding his authority, by misconduct, by negligence or omission, or by the performance of any act for which the principal sustains a loss, will render the agent liable for the consequences, however fair his motives may have been, or however pure his intentions.¹⁶¹ Whenever the orders are positive, the agent must either refuse to act, or he is bound to a

¹⁵⁶ Story, Ag. § 393; Johnson v. Catlin, 27 Vt. 89; Blanchard v. Page, 8 Gray, Mass. 281; Colburn v. Phillips, 13 Gray, Mass. 64.

¹⁵⁷ Beebee v. Robert, 12 Wend. N. Y. 413; Bickerton v. Burrell, 5 Maule & S. 382; Ackerman v. Cook, 34 Miss. 262; Crosby v. Watkins, 12 Cal. 85.

¹⁵⁸ See 1 Livermore, Ag. 226; 3 Chitty, Com. Law, 201; Paley, Ag. Lloyd, ed. 362; Morris v. Cleasby, 1 Maule & S. 576; Coppin v. Walker, 7 Taunt. 237; Walter v. Ross, 2 Wash. C. C. 283.

¹⁵⁹ Paley, Ag. Lloyd, ed. 363; Smith, Merc. Law, 67; Story, Ag. § 414; Story, Bailm, §§ 93, 152.

¹⁶⁰ Story, Ag. § 415.

¹⁶¹ Manilla v. Barry, 3 Cranch, 415, 439; Walker v. Smith, 1 Wash. C. C. 152; Rundle v. Moore, 3 Johns. Cas. N. Y. 36; Kerr v. Cotton, 23 Tex. 411.

strict observance of them.¹⁶³ But the agent is excusable for disobeying instructions when he acts under an overwhelming necessity, or is prevented from acting by a like calamity; or when urged by an unexpected or unforeseen emergency, to which his instructions did not or could not apply; or if they did apply, that he was compelled to act as he did in order to prevent a greater loss or the absolute ruin of his principal;¹⁶³ as, if goods are in a perishable condition, they may be sold contrary to instructions; or if they are accidentally injured, they may be sold to prevent further loss; or if in imminent danger of being captured in one port, they may be removed to another.¹⁶⁴ In the absence of instructions, he is bound to conform to the usages of trade, and he is liable for nothing more.¹⁶⁵

But this rule binding the agent to obey the instructions of his principal is liable to be changed in consequence of the equities of the former against the latter; for when an agent, a factor for example, has received goods for sale at a limited price, and has made advances, he may, unless the advances are returned to him after demand, sell them below the limit at a fair price to reimburse himself.¹⁶⁶

1350. A want of sufficient skill, and a neglect to employ adequate diligence for the accomplishment of the objects of the agency, will render the agent liable to the principal for the consequences.¹⁶⁷ But, it is to be remarked, he is only liable for the loss occasioned by his negligence, for if no loss has occurred in consequence of it, he will not be liable, although he may have been negligent.¹⁶⁸

1351. The agent is required to keep his principal informed as to the business of the agency, and to advise him, in reasonable time, of the sales he has made, and of such other facts and circumstances as may enable him to take measures for his security; and in cases of his neglect the agent will be responsible for all the loss he may have occasioned.¹⁶⁹

1352. When the agent is authorized either expressly or by necessary implication to appoint sub-agents, he must use the requisite degree of diligence in selecting proper sub-agents, and he will be responsible if knowingly or by negligence he selects an improper agent, through whom the principal suffers loss, or if he co-operates in the improper acts of the sub-agent.¹⁷⁰ But if the agent is not in fault, the sub-agent alone is responsible directly to the principal.¹⁷¹

1353. The above are the duties which every agent is bound to fulfil; there are others which arise from contracts in particular cases. For example, an agent is liable for the solvency of all persons to whom he has sold goods, and for which he has charged a *del credere* commission, for by this he becomes a guarantor that the buyer shall pay for the goods at the time stipulated.

¹⁶³ *Kingston v. Kincaid*, 1 Wash. C. C. 454, 457.

¹⁶³ 3 Chitty, Com. 218; *Dusar v. Perit*, 4 Binn. Penn. 361.

¹⁶⁴ See *Catlin v. Bell*, 3 Campb. 183.

¹⁶⁵ *Geyer v. Decker*, 1 Yeates, Penn. 486; *Evans v. Potter*, 2 Gall. C. C. 13.

¹⁶⁶ *Parker v. Brancker*, 22 Pick. Mass. 40, 45.

¹⁶⁷ *Redfield v. Davis*, 6 Conn. 439, 442; *Lawler v. Keaquick*, 1 Johns. Cas. N. Y. 174; *Story*, Ag. § 183; *Story*, Bailm. § 23, 455; 1 *Livermore*, Ag. 331 to 341. The agent is responsible for the want of reasonable skill, that is, such skill as is ordinarily possessed by persons engaged in the same branch of business. *Kingston v. Kincaid*, 1 Wash. C. C. 453.

¹⁶⁸ *Folsom v. Mussey*, 10 Me. 297. To make the agent liable, there must be both a wrong and damage, for *damnum absque injuria*, and *injuria absque damno*, are equally objections to a recovery.

¹⁶⁹ *Duval v. Burbridge*, 4 Watts & S. Penn. 305; 6 Watts & S. Penn. 529; *Brown v. Arrott*, 6 Watts & S. Penn. 402; *Austil v. Crawford*, 7 Ala. N. S. 336; *Forrestier v. Boardman*, 1 Stor. C. C. 44.

¹⁷⁰ *Taber v. Perrott*, 2 Gall. C. C. 565.

¹⁷¹ *Merrick v. Barnard*, 1 Wash. C. C. 479.

The engagement of the agent in this case is collateral to that of the principal debtor, and the liability of the agent does not become fixed until the principal debtor is in default.¹⁷³ But it has been held that the agent's engagement is not such a promise to pay the debt of another as is required to be in writing under the statute of frauds.¹⁷³

1354. The liability of an agent to third persons arises either from his contracts or from his torts or injuries.

It may be generally stated that an agent is not personally liable when he executes any instrument in the name of his principal; or when he makes an agreement as agent and names his principal;¹⁷⁴ or when credit is given exclusively to the principal.

1355. It is evident that when a person undertakes to do business for another as his agent he thereby assumes to be invested with that character which if true would bind the principal; but if such assumption is not founded in truth, then the supposed principal would not be liable. In this case the law holds the agent responsible personally; and when he is invested with authority, and he exceeds the power given to him, he is liable for the difference.¹⁷⁵

1356. An agent becomes responsible as a principal when he does not disclose his agency, because in that case the credit is given to him personally.¹⁷⁶ And the rule is the same although it is known that the agent is acting for others who are unknown; as, when an auctioneer sells goods, without disclosing his principal, he will be liable to the purchaser on the contract.¹⁷⁷

1357. A foreign factor is generally liable upon the contracts he enters into,¹⁷⁸ unless there be a special agreement to the contrary.

This liability arises from a presumption of fact, founded upon the usages of trade, that credit is given exclusively to the foreign factor. But this presumption may be rebutted by evidence of the intention and circumstances of the particular case.¹⁷⁹

1358. An agent is liable upon the contract when, from the form of it, it appears he intended to bind himself.¹⁸⁰ And he is equally liable when he makes a contract as agent, and there is no other responsible principal to whom resort can be had; as, if a man sign a note as "guardian of A B," an infant; in that

¹⁷³ *Thompson v. Perkins*, 3 Mas. C. C. 232.

¹⁷⁴ *Swan v. Nesmith*, 7 Pick. Mass. 220; *Bradley v. Richardson*, 23 Vt. 720.

¹⁷⁵ *Seery v. Socks*, 29 Ill. 313.

¹⁷⁶ *Story*, Ag. § 166; *Coke*, Litt. 258, a; *Comyn*, Dig. *Attorney*, C. 15; *Deming v. Bullitt*, 1 Blackf. Ind. 241; *Hampton v. Speckenagle*, 9 Serg. & R. Penn. 212; *Meech v. Smith*, 7 Wend. N. Y. 315; *Clark v. Foster*, 8 Vt. 98; *Sinclair v. Jackson*, 8 Cow. N. Y. 543; *Ballou v. Talbot*, 16 Mass. 461.

This is undoubtedly true where the contract is such in form as to bind the agent. But where the contract purports avowedly to bind only the principal, it may be doubted whether the agent can be sued on the contract itself. It is held that where one without authority signs another man's name to a note, he may be sued directly as if he were the maker of the note. *Royce v. Allen*, 28 Vt. 236; *Byarr v. Doores*, 20 Mo. 284; *Pettingell v. McGregor*, 12 N. H. 180; *Richie v. Bass*, 15 La. Ann. 668.

Other cases hold that the remedy in such cases is by a special action on the case, on his implied warranty of authority. *Hopkins v. Mehaffey*, 11 Serg. & R. Penn. 129; *Jefts v. Long*, 4 Cush. Mass. 371; *Taylor v. Shelton*, 30 Conn. 122.

¹⁷⁷ *Owen v. Gooch*, 2 Esp. 567; *Ex parte Hartop*, 12 Ves. Ch. 352; *McClellan v. Parker*, 27 Mo. 162; *Paige v. Stone*, 10 Metc. Mass. 160; *Hutchinson v. Wheeler*, 3 All. Mass. 577; *Rollins v. Phelps*, 5 Minn. 463. If the other party knows him to be an agent, it is immaterial whether he learns this from the agent or not. *Warren v. Dickson*, 27 Ill. 115.

¹⁷⁸ *Hanson v. Roberdeau*, Peake, 120.

¹⁷⁹ *Paley*, Ag. Lloyd, ed. 248, 273.

¹⁸⁰ *Oelricks v. Ford*, 23 How. 49; *Green v. Kopke*, 36 Eng. L. & Eq. 396; *Bray v. Kettell*, 1 All. Mass. 80.

¹⁸⁰ *Story*, Ag. §§ 156, 159.

case neither the infant nor his property will be liable on the note, and the agent alone will be responsible.¹⁸¹

Where a usage exists to charge the agent personally, it will be presumed that credit was given to him, and he will be bound personally by a contract.¹⁸²

1359. If, in the character of agent, a person receives money for his principal, and afterward it appears that such money was paid to him by mistake, he holds it after notice of the mistake, not for the use of the principal, who is not entitled to it, but of the person who paid it to him; and if, after such notice, he pays it to the principal, he will be responsible in an action to the person who paid it to him; for as it might have been recovered from the principal after notice, it was a wrong payment by the agent. But if, in consequence of the receipt of the money, there had been any change in relation to his principal unfavorable to himself, the agent is ordinarily not liable.¹⁸³

1360. A distinction as to the liability of an agent has been made between acts of non-feasance and acts of malfeasance; between neglects or omissions and active or positive wrongs.

1361. For acts of non-feasance, or omissions of duty, the agent's liability is confined to his principal; there being no privity between him and third persons, but a privity existing between him and his principal, the rule in those cases is, *respondeat superior*.¹⁸⁴ Thus if a servant of a common carrier should negligently lose a parcel of goods entrusted to him, the principal and not the servant is responsible to the owner; or if an under sheriff is guilty of negligence in executing a writ, an action lies against the high sheriff, and not against the deputy personally for his negligence.

1362. Contrary to the rule in cases of non-feasance, an agent is liable to a third person for his acts of misfeasance, whether such acts were authorized by the principal or not, for the principal has no right to confer an authority on him to commit a tort upon the rights or property of a third person.¹⁸⁵ Thus if the owner of a horse deliver him to a smith to shoe, and he deliver him to another smith, who lames him, the owner may have an action on the case against the latter, though he did not deliver the horse to him;¹⁸⁶ but if the servant of the smith should, by unskilfulness, lame him, no action will lie against the servant, but against his employer,¹⁸⁷ unless the servant had maliciously done the injury, when an action might be maintained against him for the tort.¹⁸⁸

1363. When the principal is a wrong-doer, the agent who participates in his acts becomes a wrong-doer also, and as such is liable for the consequence; thus, if an auctioneer should be employed to sell goods at auction which had been seized as the property of the defendant in an execution, when in fact they belonged to another person, here both the sheriff and the auctioneer would be liable to an action for the trespass.¹⁸⁹

Public officers or agents of the government are not responsible for the acts of non-feasance or misfeasance of their sub-agents, appointed under the authority

¹⁸¹ *Thatcher v. Dinsmore*, 5 Mass. 299; *Forster v. Fuller*, 6 Mass. 58; *Roberts v. Button*, 14 Vt. 195.

¹⁸² *Towle v. Hatch*, 43 N. H. 270.

¹⁸³ *Farge v. Kneeland*, 7 Cow. N. Y. 456.

¹⁸⁴ *Lane v. Cotton*, 12 Mod. 488; 1 Hare & W. Sel. Dec. 467; *Henshaw v. Noble*, 7 Ohio, St. 231.

¹⁸⁵ *Paley*, Ag. Lloyd, ed. 398; *State v. Matthis*, 1 Hill, So. C. 37; *Owings v. Hull*, 9 Pet. 607; *Richardson v. Kimball*, 28 Me. 464; *Bennett v. Ives*, 30 Conn. 329; *Wright v. Eaton*, 7 Wisc. 595.

¹⁸⁶ *Rolle*, Abr. 90.

¹⁸⁷ 1 Sharswood, Blackst. Comm. 430.

¹⁸⁸ *Story*, Bailm. § 402, 409; *Story*, Ag. § 310.

¹⁸⁹ *Freebrother v. Ansley*, 1 Campb. 343.

of the laws for public purposes,¹⁹⁰ but each sub-agent, being equally a public agent, is responsible for his own acts.

1364. *The dissolution of the agency* is the termination of the powers given to the agent. This may take place in two ways: by the act of the parties or of one of them; by operation of law.

1365. The first may take place by the revocation of the principal or by the renunciation of the agent.

1366. A *revocation* is the act by which a person having authority calls back or annuls a power which had been bestowed upon another. The revocation of an agency is the act by which the principal declares it at an end. Let us consider successively: when a revocation may be made, when it takes effect, the modes of revocation, limits to the rights of revocation.

1367. In general, the principal has a right to revoke an authority at his pleasure, for as the authority was created by his own will, it can subsist only while that will operates or is presumed to be the same; when, therefore, the principal declares that he no longer wills that the agent should act, but revokes the authority given, the power of the agent is at an end.

But this revocation must be made before the agent has commenced the business of the agency, or if made after, it must be subject to all the lawful acts of the agent under the power. A distinction has been made, where the authority has been partly executed by the agent, between those cases where the authority admitted of severance and those which did not. If the authority admitted of severance, then the revocation would be good as to the part unexecuted, but not as to that which was already executed.¹⁹¹ If, on the contrary, the authority was not thus severable, and in consequence of the revocation damage would happen to the agent on account of the execution of the authority *pro tanto*, then the principal would not be allowed to revoke the unexecuted part without, at least, fully indemnifying the agent.¹⁹²

The power of a substitute, depending upon the authority of the agent, is of course at an end the moment that the authority of the agent ceases.

1368. The revocation takes effect as to the agent when it is made known to him, and as to third persons when it is made known to them. As between the principal and himself, the agent has no further power the moment the revocation is made known to him; and if afterward he should do any act by which the principal might be prejudiced, the agent would be answerable for all the consequences. But a third person, knowing that an agency did exist, has a right to presume its continuance, and the principal will be bound by the agent's acts until such third person shall be notified of the revocation;¹⁹³ thus, if a clerk has been employed to sign or indorse bills, and he is discharged by the principal, if the discharge is not known to persons dealing with him, bills subsequently signed, indorsed, or accepted by him will bind the principal, he having his remedy against the clerk.¹⁹⁴ And a payment made to an agent after the revocation of the authority, unknown to the debtor, will be good.¹⁹⁵

1369. The revocation may be express or implied.

¹⁹⁰ *United States v. Kirkpatrick*, 9 Wheat. 720; *Conwell v. Voorhees*, 13 Ohio, 523.

¹⁹¹ An agency may be revoked where there has been a partial execution, or preliminary proceedings, not to such an extent as to become obligatory upon the parties, and no damage cognizable at law will result from the revocation. *Lewis v. Sawyer*, 44 Me. 332.

¹⁹² Story, Ag. § 466; 2 Story, Eq. Jur. § 1041-1047; Dig. 50, 17, 75; 1 Domat, b. 1, t. 16, § 3, art 9; Pothier, Mandat, n. 121; *United States v. Jarvis*, Dav. Dist. Ct. 274.

¹⁹³ *Beard v. Kirk*, 11 N. H. 397.

¹⁹⁴ 3 Chitty, Com. and Man. 197.

¹⁹⁵ Pothier, Obl. n. 509.

An *express* revocation may be by a direct and formal declaration, publicly made known, or by an informal writing, or by parol.¹⁹⁶

An *implied* revocation may arise from circumstances. It is not always easy to say what circumstances amount to a revocation. An example or two will show the nature of those which have that effect: when the principal having appointed one agent afterward appoints another to do the same business, it will be presumed that the agency of the first is at an end;¹⁹⁷ *eum, qui dedit diversis temporibus procuratores duos, posteriorem dando priorem prohibuisse videri.*¹⁹⁸ This, of course, must be understood of cases where the rights and powers of the agents are incompatible. Again, if a principal should entrust another to collect a debt for him, and for that purpose deliver to him a promissory note to be delivered to the debtor on payment of the money, and afterward the principal should take back the note, that would be an implied revocation of the authority of the agent.

1370. Although the general rule is that the principal may revoke the authority of the agent at pleasure, yet there are some limits to this power.

When the principal has agreed that the authority should not be revoked, and the agent has an interest in its execution, the principal cannot revoke it; but in this case there must be such an agreement, and the agent must have such an interest, for unless these circumstances concur, the revocation may be made.

When the authority is coupled with an interest, unless there is an express agreement that it shall be revocable, it cannot be revoked, for that would be depriving the agent of a vested right.¹⁹⁹

1371. The agency may be determined by the *renunciation* of the agent, that is, by surrendering the authority which has been given to him. It may be before any part of the authority has been executed, or when it has been in part executed. When the agency is purely voluntary and gratuitous, the principal is not entitled to any damages for its non-execution; but if it was in part executed and then renounced, by which the principal has sustained damages, the agent might be held responsible. And when the agency is founded on a valuable consideration, if the renunciation of the agent causes any loss to the principal, he will be held responsible, whether the authority be in part executed or not.²⁰⁰

In all cases, whenever the agent renounces his agency he is required to give notice to his principal, and a failure to do so will render him amenable for the losses his neglect may occasion, if the omission should be deemed fraudulent.

1372. The agency is dissolved by operation of law in various ways: by the efflux of time, by the occurrence of events by which it was limited, by the change of the state or condition of one of the parties, by the death of either party, by the extinction of the subject matter of the agency or of the principal's power over it, by its complete execution.

1373. It is evident that when the agency is created for a period of time that it ceases as soon as the time has elapsed; as, if it were created for one year, after that time the agent would have no power.

1374. When the agency is created until some future event shall happen, it becomes extinct upon its happening; as, if one about to leave home appoint a

¹⁹⁶ An agency created by a sealed instrument may be revoked by parol. *Brookshire v. Brookshire*, 8 Ired. No. C. 74.

¹⁹⁷ *Morgan v. Stell*, 5 Binn. Penn. 305; *Copeland v. Merc. Ins. Co.*, 6 Pick. Mass. 198. So where the principal assigns the subject matter. *Trumbull v. Nicholson*, 27 Ill. 149.

¹⁹⁸ Dig. 3, 8, 31, 2; Pothier, Mandat, n. 114, 115.

¹⁹⁹ *Hunt v. Rousmaniere*, 2 Mas. C. C. 244; 1 Pet. 1; *Kindig v. March*, 15 Ind. 248.

²⁰⁰ Story, Bailm. § 436; Jones, Bailm. 101; 3 Sharswood, Blackst. Comm. 157.

person to attend to his business in his absence, the power ceases the moment his return becomes known to the agent; indeed, whether there were a limitation in the power of attorney or not, the return of the principal might, perhaps, be considered as a revocation.²⁰¹

1375. The incapacity of parties may be in the principal or in the agent.

1376. As a general rule, the authority of the agent, being derived from the principal, cannot rise higher than its source; if the principal ceases to have authority, that of the agent is extinguished. For example, if a feme sole should constitute another her agent by power of attorney, and afterward she should marry, the marriage would, *ipso facto*, amount to a revocation; because a married woman cannot, without her husband, constitute an agent. Again, if the principal should become insane, as he could not do any act while in that state, the agent could not in the same time act in his name; but in such case the insanity ought, perhaps, to be established by an inquisition.²⁰²

As bankruptcy and insolvency, as soon as assignees are appointed, deprive the principal of his property, it follows that the appointment of the agent is revoked by such an event, unless in those cases where the rights of the bankrupt do not pass by the assignment,²⁰³ and perhaps some other cases where equity would enforce the act to be done.²⁰⁴

But it must be remembered that this revocation by incapacity of the principal does not affect those cases where the agent's authority is coupled with an interest, for in that case he has an equitable right in the subject matter of the agency, of which he cannot be deprived by the acts or misfortune of the principal.

1377. An agent may act as such, although he might not be able to act for himself, and therefore his change of condition, in some cases at least, does not deprive him of the ability to act for others; for example, a married woman cannot act for herself, but, unless prohibited by her husband, may act as the agent of another; her marriage after her appointment would not, therefore, *per se*, disqualify her to act as an agent; and if her agency is coupled with an interest, it is irrevocable.²⁰⁵

Bankruptcy does not necessarily suspend or revoke the power of the bankrupt to act as agent for another.

Insanity, when established, necessarily annuls the agency.

1378. Dissolution of the agency may be caused by the death either of the principal or of the agent.

1379. A mere naked power is revoked by the death of the principal, whether it be expressed to be irrevocable or not;²⁰⁶ but when it is coupled with an interest, the death of the principal is no revocation.²⁰⁷ As a general rule it may be laid down that in the case of the death of the principal the power of the agent ceases, whether such death were known or not, and that all the acts of the agent afterward are void, because the instant the constituent dies, the estate belongs to his personal representatives, or his heirs, or devisees, or creditors; and their rights cannot be divested or impaired by any act performed by the attorney afterward, the attorney being then a stranger to them, and having no control over their property;²⁰⁸ and as an additional reason it is urged that the

²⁰¹ Pothier, Mandat, n. 119.

²⁰² See *Hunt v. Rousmaniere*, 8 Wheat. 174; 2 *Livermore*, Ag. 307; *Story*, Bailm. § 206; *Davis v. Lane*, 10 N. H. 156.

²⁰³ *Paley*, Ag. Lloyd, ed. 187; *Dixon v. Ewart*, 3 Mer. Ch. 322.

²⁰⁴ *Anon.* Salk. 117; *Marder v. Lee*, 3 Burr. 1469.

²⁰⁵ *Galt v. Galloway*, 4 Pet. 332; *Saltmarsh v. Smith*, 32 Ala. n. s. 404; *Gleason v. Dodd*, 4 Metc. Mass. 333; *Travers v. Crane*, 15 Cal. 12; *Scruggs v. Driver*, 31 Ala. n. s. 274; *McGriff v. Porter*, 5 Fla. 373.

²⁰⁷ *Michigan Ins. Co. v. Leavenworth*, 30 Vt. 11; *Marzion v. Pioche*, 8 Cal. 522.

²⁰⁸ *Harper v. Little*, 2 Me. 14, 18; *Hunt v. Rousmaniere*, 8 Wheat. 201.

act is invalid, because it must be performed in the name of the principal, and he had then no existence.²⁰⁹ But it has been held that, under certain circumstances, acts of an agent, performed *bona fide*, in ignorance of the principal's death, are binding.²¹⁰

1380. The death of the agent of course puts an end to the agency, for it then becomes impossible for him to execute the power; and as he was selected on account of his personal qualifications, it follows that the authority does not become vested in his personal representatives.

As a substitute is appointed by the agent, under a power of substitution, and as the agent is accountable to the principal for the acts of his substitute, it follows that the death of the agent extinguishes the authority of the substitute.²¹¹ But a distinction has been made in this case between a substitute who acts for the agent and a sub-agent who has been appointed by the agent, who is to act independently of the agent; as, where a power is given to an agent to transact the business of the agency, and an additional power is given to him that if he will not act, then to appoint another who will; in that case the death of the agent will not revoke the appointment of the sub-agent.²¹²

1381. When the matter which is the subject of the agency is lost or destroyed, it is evident the agency is annulled. If I authorize you to sell my horse to another, and the horse dies, the agency is at an end; if I sell him myself, and you have knowledge of the fact, you cannot afterward sell him by my authority, because there is an implied revocation of the agency.

1382. It is not required to say anything more than barely to state that as soon as the agent has completed the business with which he was entrusted, his agency is *functus officio*; having received its natural termination, from thenceforth his authority ceases.²¹³

²⁰⁹ Story, Ag. § 488.

²¹⁰ *Cassaday v. McKensie*, 4 Watts & S. Penn. 282; *Carriger v. Whittington*, 26 Mo. 313; *Ish v. Crane*, 13 Ohio, St. 574. This exception includes acts which are or may be done in the name of the agent.

²¹¹ Pothier, Mandat, n. 105; 2 Livermore, Ag. 308.

²¹² Pothier, Mandat, n. 105; Story, Bailm. § 20; Story, Ag. § 490. The question in these cases is whether the sub-appointee is the agent of the agent or the agent of the principal.

²¹³ *Bradford v. Bush*, 10 Ala. N. S. 386.

CHAPTER XII.

SURETYSHIP AND GUARANTY.

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1363. *Suretyship* is an accessory agreement, by which a person binds or obligates himself for another already bound for the fulfilment, either in whole or in part, of such obligation, if the obligor or debtor does not fulfil it. Pothier defines suretyship to be a contract by which some one binds himself for an obligor toward an obligee to fulfil, in whole or in part, what the obligor is bound for, by acceding to his obligation.¹

The contract of suretyship is one of the contracts contemplated by the statute of frauds, and the subject has already been under consideration with reference to the effect of that statute.²

It is closely analogous to the contract of guaranty, but the latter applies only to contracts not under seal, while suretyship includes all whether parol or sealed. But most of the principles which relate to one are applicable to both contracts.

1364. The person for whom another is bound is called the principal *debtor or obligor*; the person to whom he is bound is the *creditor or obligee*; and he who is so bound for another is the *surety*.

There may be one or more debtors, creditors, or sureties; and the obligation of any of these may be several, joint or joint and several. The capacity of the parties is governed by the rules applicable to all contracts.

1365. The person undertaken for must be liable as well as the person making the promise, for otherwise the promise would be a principal and not a collateral agreement, and the promisor would be liable in the first instance; as, if one should become surety for a debt contracted by a slave, or a person found by inquisition to be *non compos mentis*, as the slave and the person *non compos mentis* would not be bound, there would be no principal, and consequently no contract of suretyship; and the person thus undertaking, if he knew of the incapacity of the supposed principal, would be considered as a principal.³ Again, if a person having no authority from another undertakes to contract a debt in his name, and then becomes surety for it, he will be considered as a principal.⁴

It is often essential to determine to whom credit is given in the first place in order to decide whether a party is liable as principal or surety. If I promise A that I will pay for goods bought by B, and A delivers the goods, the credit is given to me, and I am liable as principal; but if the credit is given to B, then I am liable only as surety or guarantor. And if B is an infant, so that he may avoid the debt, still I am only a surety if credit is given to him.⁵

1366. Like all other contracts, the contract of suretyship requires a consideration. But this may not be a consideration passing between the creditor and surety, and usually is not. When it is simultaneous with the principal contract, the consideration of that contract is sufficient for the suretyship.⁶ But

¹ The words of the original are, "Le cautionnement est un contrat par lequel quelqu'un s'oblige pour le débiteur envers le créancier, à lui payer, en tout ou en partie, ce que débiteur lui doit, en accédant à son obligation." *Traité des Obligations*, n. 366. This definition has been pronounced deficient by Theobald, because Pothier uses the word *payer*, which Mr. Theobald translates, *to pay*. Theobald, *Princ. & S.* 1. But in the sense in which it is used, it signifies *to fulfil*, or *discharge*, in the same way that *solvere* is used in the Roman law, namely, *to untie*, *to unbind*. Mr. Theobald says that *débiteur* and *créancier* are susceptible of a corresponding obligation. These words signify rather obligor and obligee; *débiteur* is one who is bound to perform some engagement, and *créancier*, (the word used by Pothier, and not *crédeur*,) is one to whom a *créance* or claim is owing. See 1040.

² Before, 912-914.

³ Burge, *Sur.* 6; Pitman, *P. & S.* 13; Pothier, *Obl.* n. 367; Burchmyer *v.* Darnall, 2 *Ld. Raym.* 1066; Harris *v.* Huntback, 1 *Burr.* 373.

⁴ Burrell *v.* Jones, 3 *Barnew. & Ald.* 47; Thompson *v.* Bond, 1 *Campb.* 4.

⁵ Chapin *v.* Lapham, 20 *Pick. Mass.* 467.

⁶ Leonard *v.* Vredenburgh, 8 *Johns. N. Y.* 37.

where the principal contract exists before the contract of suretyship, there must be some new consideration. Thus the creditor may, in this case, agree not to sue the debtor; but this must be an agreement, not mere forbearance.⁷

1387. The contract may be entered into absolutely, or it may be upon certain conditions. One may become surety on condition that others shall sign as co-sureties, and he will not be bound unless their signatures are obtained.⁸ But he will be bound if, by his negligence, he allows the obligee to enter into the agreement in ignorance of such a condition and relying on his suretyship.⁹

1388. The contract may be in writing, under seal or not under seal, or it may be oral when not required to be in writing by the statute of frauds. It cannot be presumed; it ought to be express; and it must be restrained within the limits intended by the contract. The effect of the statute of frauds in this respect has been considered in another place.¹⁰ But whatever may be its form, like every other contract it requires the consent of the party to whom, as well as of the person by whom, the promise is made. Hence, if the instrument does not express an absolute engagement, but a proposal or offer to guarantee, the contract is not complete until the party to whom the proposal has been made has signified his acceptance of it. A distinction must be made between an offer to guarantee at a future time and an absolute present guaranty. The former is not binding until accepted; the latter takes effect as soon as made. An example or two will explain the difference: "I guarantee the payment of any goods which A B delivers to C D" is a present guaranty, and the party to whom it is given may act on it without further communication.¹¹ On the other hand, "I have no objection to guarantee you against any loss for giving them this credit;"¹² "I have no objection to be answerable as far as £50. For any reference apply to Messrs. B. & Co. of this place," have been held as mere proposals to guarantee. It followed that the party to whom they were severally made ought to have given notice to the maker of his acceptance¹³ to constitute a binding contract.

Formal notice of an acceptance of the offer is not required in all cases to bind the party making the offer, but he may be bound by knowledge that the offer to guarantee has been acted on.¹⁴ The notice of acceptance required by an offer to guarantee must be given within a reasonable time.¹⁵

A general rule applicable to future guaranties is that no notice is required when the guaranty is absolute and definite in amount, but notice must be given if it is contingent and indefinite in amount.

1389. *The extent of the obligation of the surety is to be determined by the terms of the contract and the construction as favorable to him. He is never held responsible beyond the clear and absolute terms and meaning of his undertaking, and presumptions or equities are never allowed to enlarge or in any degree to change his legal obligation.*¹⁶ His liability cannot exceed in any event that of the principal; it cannot be of greater extent nor more onerous, either in

⁷ *Walker v. Sherman*, 11 Metc. Mass. 170.

⁸ *Swope v. Forney*, 17 Ind. 385.

⁹ *Newby v. Hill*, 2 Metc. Ky. 608.

¹⁰ Before, **918**.

¹¹ *Oxley v. Young*, 2 H. Blackst. 613; *Stadt v. Lill*, 9 East, 348; *Hargrave v. Smee*, 6 Bingh. 244; *Farmers' Bank v. Kercheval*, 2 Mich. 511.

¹² *McIver v. Richardson*, 1 Maule & S. 557.

¹³ *Mozley v. Tinkler*, *Crompt. M. & R. Exch.* 692; *Burge, Suretyship*; *Wardlaw v. Harrison*, 11 Rich. So. C. 626; *McDougal v. Calef*, 34 N. H. 534.

¹⁴ *Paige v. Parker*, 8 Gray, Mass. 211; *Noyes v. Nichols*, 28 Vt. 160; *New Haven Bank v. Mitchell*, 15 Conn. 219.

¹⁵ *Schlessinger v. Dickinson*, 5 All. Mass. 47.

¹⁶ *Leggett v. Humphreys*, 21 How. 66; *Manufacturers' Bank v. Cole*, 39 Me. 188; *Kellogg v. Stockton*, 29 Penn. St. 460.

its amount or in the time or manner or place of performance, than the engagement of the principal.¹⁷

But in regard to remedies, these may be more extensive against the surety than against the principal; for example, the performance of his obligation by the surety may be secured by mortgage, judgment, or a penalty, while that of the principal may rest on the personal security of the debtor. And there may be defences open to the principal, but not to the surety, as infancy or coverture.¹⁸

The liability of the surety extends to all securities given to him by the principal, and the creditor is entitled to the benefit of them.¹⁹

1390. In general, the obligations of the surety are the same as those of the principal within the scope of the contract, and may be limited in regard to the subject matter and in regard to time.

When one becomes surety for the fidelity of another in an office of limited duration, or the appointment to which is for a limited period only, he is not obliged beyond that period; as, where one appointed a deputy for six months, and took the obligation of a surety that the deputy should, during all the time he continued deputy, faithfully execute the duties of his office, and during the six months he faithfully so performed his duties, but afterward, having been continued for a further time, he committed a breach of duty, the surety was held discharged.²⁰

The contract may be so phrased as to continue the liability of the surety during the continuance of the principal in office for a further term by suitable provisions; as, by binding the surety "for such further time as the principal shall be re-elected to such office."²¹ In general, if the principal is to hold office for a limited time, as a year, and "until a successor is qualified," an obligation by the surety for a year or for the term will include such reasonable, short, additional time as elapses before a successor is qualified.²²

Where one becomes surety on a treasurer's bond conditional for the faithful accounting for money received, his liability continues until the money received during the term is accounted for, but will not extend to money received after the term, the treasurer holding over.²³

1391. The sureties upon an official bond are only liable for acts performed within the scope of the official duties of the principal, and not for acts which have no connection with his office.²⁴ Thus the sureties on a cashier's bond are not liable for money collected by him as an attorney at law and not accounted for to the bank.²⁵ And, in general, where a bond is given to guard against misappropriation of money by the principal, it is applicable only to such funds as he receives by virtue of his office and which it is his official duty to receive.²⁶

1392. The obligation assumed by the surety is governed by the facts at the time of forming the contract, and will include only such acts as are contem-

¹⁷ *Kyle v. Bostick*, 10 Ala. N. S. 589.

¹⁸ *St. Albans Bank v. Dillon*, 30 Vt. 122.

¹⁹ *Paris v. Hulet*, 26 Vt. 308.

²⁰ *Arlington v. Merrick*, 2 Saund. 403; *Welch v. Seymour* 28 Conn. 387; *Dover v. Twombly*, 42 N. H. 59; *Wapello v. Bigham*, 10 Iowa, 39.

²¹ The terms used must clearly show an intention to continue the liability beyond the first term. *State Treasurer v. Mann*, 34 Vt. 371.

²² *Amherst Bank v. Root*, 2 Metc. Mass. 522; *Thompson v. State*, 37 Miss. 518. This rule, like all others, will be construed favorably to the surety. *Middlesex Co. v. Lawrence*, 1 All. Mass. 340.

²³ *Porter v. Stanley*, 47 Me. 515.

²⁴ *Schloss v. White*, 16 Cal. 65; *Hardin v. Carrico*, 3 Metc. Ky. 289; *Boston v. Moore*, 3 All. Mass. 126.

²⁵ *Dedham Bank v. Chickering*, 4 Pick. Mass. 314.

²⁶ *Henckler v. County Court*, 27 Ill. 39; *Sample v. Davis*, 4 Greene, Iowa, 117; *Mills v. Allen*, 7 Jones, No. C. 564.

plated at that time. Thus, a surety on an official bond cannot be held for a breach of new duties attached to the principal's office after the bond is given.²⁷ So when a guaranty is made as to the character for honesty of a clerk to one man, and he afterward takes a partner; or when the guaranty is made to a partnership, and afterward the number of members of the firm is either increased or diminished, it is evident that the liability of the surety is not the same after the change as it was before. In these cases the partnership after the change is not the same as before, and the engagement of the surety does not extend to the new firm.²⁸ And so if one were to become surety for refunding all advances that A & B, two partners, should make to C, and B should die, after which advances should be made by A to C, the surety would not be responsible.²⁹

When the surety undertakes for a particular individual, the engagement extends only to his acts; and if the principal take a partner, the surety will not be bound for the acts of the firm; as, where a banker employed A to transact business for him, and took a bond with surety for the faithful execution of the trust; and A took B as his partner, and the banker trusted A & B, on a suit for a breach of the condition it was held the banker was not entitled to recover,³⁰ because the surety did not guarantee the acts of the firm.

For a similar reason, if the engagement of the surety is for more persons than one, he is considered liable for them jointly and collectively, and in case of the death of one, he is not responsible for the acts of the survivors.³¹

1393. *The amount of the liability* of a surety on bonds is limited to the penalty, and may be much less. Where there are no circumstances limiting the obligation, the surety is held for the same amount as the principal,³² and his liability embraces the accessories and consequences to which the principal is liable.³³

When the surety agrees to become responsible for a certain sum, he is liable only for that; as, where he agreed to be responsible to the amount of one hundred dollars, he cannot be made to pay one hundred dollars and the interest; or if he should become surety that my tenant will pay his rent, he is not liable for the breach of other covenants in the lease.

But, on the contrary, if the surety becomes bound in general and indefinite terms, he makes himself liable for all the engagements of the principal resulting from the nature of the contract; for example, when the surety becomes bound to me that my tenant will perform his covenants in the lease existing between us, he is bound not only to see that my tenant pays his rent, but also that he performs all the covenants he has obligated himself to perform toward me; and if the rent be in arrears, and the principal be liable for interest, he will also be responsible.

1394. But when the guarantor undertakes, by the terms of his engagement, to be liable for any debts which may be contracted at any time, this is called a *continuing guaranty*, and the surety is responsible for any debt contracted by the principal, within the limits of the engagement as to amount; as, where the surety wrote to the creditor, "I consider myself bound to you for any debt he may contract for his business as a jeweller, not exceeding one hundred pounds, after this date." The principal bought goods from time to time for more than

²⁷ Theobald, Sur. 72.

²⁸ Wright v. Russell, 3 Wils. 530; Myers v. Edge, 7 Term, 254; Penoyer v. Watson, 16 Johns. N. Y. 100.

²⁹ Strange v. Lee, 3 East, 484. See Weston v. Barton, 4 Taunt. 673; Russell v. Perkins, 1 Mas. C. C. 368.

³⁰ Bellairs v. Ellsworth, 3 Campb. 52.

³¹ Simson v. Cooke, J. B. Moore, 588; 1 Bingham. 452.

³² Smith v. Rogers, 14 Ind. 224.

³³ Benjamin v. Hillard, 23 How. 149.

a year afterward, during which time they had several settlements, and he paid the creditor more than one hundred pounds; this was held to be a continuing guaranty, and the surety was responsible for that sum which the principal owed the creditor.³⁴

1395. The creditor cannot proceed against the surety until he has acquired a full right of action against the principal debtor. The debt must be fully due. If there are any conditions precedent to a right of action against the principal, these must be complied with. Thus if the debt is due on demand, it must have been demanded. It is not necessary that the creditor should exhaust all the means of obtaining his debt. Thus if he has collateral security, he need not resort to that before suing the surety.

In some cases it is requisite that upon default of the debtor, the creditor should give notice to the surety before bringing suit, so that he shall have an opportunity to pay without an action, but this is not in general necessary, especially where the engagement is absolute and for a definite amount.³⁵

1396. *The extinction or dissolution of the contract of suretyship may take place: by the terms of the contract itself; by the acts to which both the principal and creditor are alone parties; by the acts of the creditor and surety; by the acts or omission of the creditor; by the acts of the surety; by mistake; by fraud; by operation of law.*

When by his contract the surety limits the period of time for which he undertakes to be responsible, it is clear that he cannot be held for a longer period; as, when he engages that an officer who is elected annually shall faithfully perform his duty during his continuance in office, his obligation does not extend for the performance of his duties by the same officer, who may be elected for a second year;³⁶ or where a clerk was appointed for six months and gave security for the faithful performance of his duties as such, the surety was held not to be responsible for acts done after the six months expired.³⁷

1397. The surety is discharged from his liability by any *acts of the creditor and of the principal* which diminish the rights or remedies of the surety, or substantially alter the contract into which he has entered. Among these acts are compromise, respite or extension of time, novation, delegation, or alteration of the contract, accord and satisfaction, surrendering of collaterals by the creditor to the principal.

1398. A *compromise* is an agreement between two or more persons who amicably settle their differences on such terms as they can agree upon. When the compromise is made between the creditor and the principal debtor, the latter is wholly released from his engagement, and, as the surety's obligation is merely accessory, it follows that he is also discharged, for otherwise this result would follow, that if the surety paid the debt, he might sue the principal debtor, who had actually been released by the creditor, and the latter would obtain circuitously what he could not directly.

But this rule must be understood as applying only to discharge the obligation of the surety as such; for if, previous to the composition or release of the principal, the surety has so far changed the nature of his engagement as to become a principal himself, he will not be discharged by the compromise or a release; as, where previously to the time when a release was given by the creditor the surety paid a part of the debt and gave a security for the remainder, and by that means made it his individual debt, it was held that although the cred-

³⁴ *Marle v. Wells*, 2 Campb. 413. See *Cramer v. Higginson*, 1 Mas. C. C. 323; *Pitman, Pr. and Su.* 41; *Theobald, Sur.* 66; *Rindge v. Judson*, 24 N. Y. 64.

³⁵ *Theobald, Sur.* 137.

³⁶ *Bartlett v. Attorney General*, Park. Exch. 277; **1390**, note.

³⁷ *Arlington v. Merrick*, 2 Saund. 403, 411.

itor released the principal afterward, the surety was bound for that part of the debt which remained unpaid.³⁸

1399. *Respite*, in the sense it is here employed, is a delay, forbearance, or continuation of time. Any agreement for a sufficient consideration by which a creditor gives his debtor a delay of time of paying his debt, beyond that contained in the original agreement, has the effect of discharging all the obligations of persons who are mere sureties, unless such respite has been given with the consent of such sureties, because this is such a change of the contract as to suspend the right of action against the principal, and consequently against the surety, and it is a rule that a right once suspended is gone for ever; it may be revived, it is true, but that must be with the consent of all the parties bound by it.³⁹ In order to have this effect, the creditor must deprive himself of the right to sue, at least for a time; for a mere delay in suing without fraud or any agreement with the principal is not such respite or giving time as will discharge the surety.⁴⁰

To discharge the surety the agreement must be binding and supported by a valid consideration. If the creditor, the debt being overdue, receives interest in advance from the debtor, this alone does not make a binding contract, but is *prima facie* evidence of it.⁴¹

Upon a principle similar to this, that giving time to the principal discharges the surety, it has been decided in Pennsylvania that the creditor is bound to sue the principal when required by the surety, and the debt is due when a proper notice is given to the creditor that, unless he sues, the surety will consider himself discharged.⁴² But the reason of this is, that the courts in Pennsylvania administer equity through the medium of legal proceedings; for there, by the established usage of the courts, a defendant may protect himself by an equitable defence.⁴³ And courts of equity will grant relief in such cases.⁴⁴

1400. A *novation*, we have seen, is a substitution of a new debt for an old one.⁴⁵ When the creditor and the principal agree to substitute a new for an old debt, it is evident that the surety for the payment of the old debt is totally dis-

³⁸ Hall v. Huchons, 3 Mylne & K. Ch. 426.

³⁹ Rolle, Abr. *Extinguishment* (L), (M); see United States v. Hallegas, 3 Wash. C. C. 70; Chippenger v. Creps, 2 Watts, Penn. 45; Bank v. Woodward, 5 N. H. 99; Bank v. Hoge, 6 Ohio, 17; Kennebec Bank v. Tuckerman, 5 Me. 130; Pilgrim v. Dykes, 24 Tex. 383; Cunningham v. Wrenn, 23 Ill. 64.

⁴⁰ King v. Baldwin, 2 Johns. Ch. N. Y. 529; Cope v. Smith, 8 Serg. & R. Penn. 113; Wright v. Sampson, 6 Ves. Ch. 734; see Sailey v. Ellmore, 2 Paige, Ch. N. Y. 497; Baird v. Rice, 1 Call, Va. 18; Ellis v. Bibb, 3 Ala. 63; Hunt v. United States, 1 Gall. C. C. 32; Hunt v. Bridgman, 2 Pick. Mass. 581; Naylor v. Moody, 3 Blackf. Ind. 93; Miller v. Stem, 2 Penn. St. 286; Parnell v. Price, 3 Rich. So. C. 121; Waters v. Simpson, 7 Ill. 570; United States v. Hodge, 6 How. 279; Horne v. Bodwell, 5 Gray, Mass. 457; Humphreys v. Crane, 5 Cal. 173; Richards v. Commonwealth, 40 Penn. St. 146; Kirby v. Studebaker, 15 Ind. 45; Hunt v. Knox, 34 Miss. 365.

⁴¹ People's Bank v. Pearsons, 30 Vt. 711; Dubuisson v. Folkes, 30 Miss. 432. Contra, Agricultural Bank v. Bishop, 6 Gray, Mass. 317.

⁴² Cope v. Smith, 8 Serg. & R. Penn. 110; Gardner v. Ferree, 15 Serg. & R. Penn. 29, 30; Erie Bank v. Gibson, 1 Watts, Penn. 143; and see Remsen v. Beekman, 25 N. Y. 552. But if the indulgence is merely permissive, no eventual loss will discharge the surety. United States v. McCormick, 3 Penn. 437; see Johnson v. Thompson, 4 Watts, Penn. 446; Geddes v. Hawk, 10 Serg. & R. Penn. 33; Lichtenhaler v. Thomson, 13 Serg. & R. Penn. 157; Wilson v. Glover, 3 Penn. St. 404. In Alabama the law is the same. 18 Ala. 409.

⁴³ Cope v. Smith, 8 Serg. & R. Penn. 110, 115; Eddowes v. Nixel, 4 Dall. 133; Gardner v. Ferree, 15 Serg. & R. Penn. 29; see Rees v. Berrington, 2 Ves. Ch. 540; Nesbit v. Smith, 2 Brown, Ch. 579, 582; King v. Baldwin, 2 Johns. Ch. N. Y. 554; 17 Johns. N. Y. 334; Wright v. Simpson, 6 Ves. Ch. 734.

⁴⁴ Pitman, Princ. & S. 125; Nesbitt v. Smith, 2 Brown, Ch. 579; Gilb. Eq. 67; Antrobus v. Davidson, 3 Mer. Ch. 569.

⁴⁵ Before, 800.

charged. But in such case the old debt must be totally extinguished, for if the debtor or principal give his note for a debt due on book account, for which debt the surety was bound, it will not operate as a release of the old debt unless it was so intended.⁴⁶

In the same way, if the principal procure another to become debtor in his place, the surety is released. And if the principal and the creditor agree to change the contract in any material part more onerous to the surety, the latter is discharged from his obligation, for he cannot be held bound for a contract to which he was no party; and the altered contract is not the same for which he became security.⁴⁷ Indeed, such change releases the surety when made without his consent, though he sustains no injury by it, or even receives a benefit.⁴⁸

1401. When the principal is bound by his engagement to pay a sum of money, or to perform some covenant or promise, and he gives security, and afterward, without the consent of the surety, the creditor receives another thing in the place of what is owing to him, this is said to be an accord and satisfaction.⁴⁹ This has the effect of releasing the surety.

1402. The surety is entitled to all the advantages and benefit which the creditor can derive from property put into his hands by the principal as a collateral security, for on the payment of the debt by himself to the creditor, he may claim the application of such collateral property to reimburse him; if, therefore, the creditor surrender such property without the consent of the surety, he loses his claim against the latter to the extent of the value of the property given up.⁵⁰

The fact that the surety did not know of the existence of such securities will not affect his rights, for he is in all cases entitled to the benefit arising from them;⁵¹ where, therefore, a debt was secured by two promissory notes given by two sureties, each for half of the amount of the debt, and the principal debtor also gave the creditor a warrant of attorney, upon which judgment was entered, and the goods of the debtor were seized under an execution issued on the judgment, and the creditor afterward withdrew the execution, it was held that the sureties were discharged *pro tanto*.⁵²

And it makes no difference whether the creditor has the security at the time of the formation of the original obligation or receives it afterward, for such security is received by him for the benefit of the surety as well as himself.⁵³

1403. The acts of the principal alone which discharge the surety are, performance of covenants or payment of the debt, tender, set-off.

1404. It is clear that when the principal pays the debt, the surety is discharged from all obligations, because he became surety simply that the principal should do what he has done. The only difficulty in the case is to know

⁴⁶ Roth v. Miller, 15 Serg. & R. Penn. 100; Sneed v. White, 3 J. J. Marsh, Ky. 527; Brown v. Wright, 7 T. B. Monr. Ky. 398. The question in these cases is whether giving a note is payment, and this depends upon the intention of the parties. See before, **818**. If intended as payment, it extinguishes the debt and discharges the surety. Musgrave v. Glasgow, 3 Ind. 31.

⁴⁷ Burge, Sur. 214; Bonsor v. Cox, 6 Beav. Rolls, 110; Clarke v. Henty, 3 Younge & C. Ch. 187; Eyre v. Bartrop, 3 Madd. Ch. 221.

⁴⁸ Miller v. Stewart, 9 Wheat. 680; United States v. Tillotson, Paine, C. C. 305; Commissioners v. Ross, 3 Binn. Penn. 520; U. States v. Hillegas, 3 Wash. C. C. 70; St. Albans Bank v. Dillon, 30 Vt. 122; Miller v. Stewart, 4 Wash. C. C. 26.

⁴⁹ Before, **805**. In Louisiana this is called *dation en paiement*. Civ. Code, art. 2625.

⁵⁰ Baker v. Briggs, 8 Pick. Mass. 122; Commonwealth v. Miller, 8 Serg. & R. Penn. 452. See McLean v. Lafayette Bank, 3 McLean, C. C. 587.

⁵¹ Mayhew v. Crickett, 2 Swanst. Ch. 185; Law v. East Ind. Co., 4 Ves. Ch. 824.

⁵² Mayhew v. Crickett, 2 Swanst. Ch. 185.

⁵³ Springer v. Toothaker, 43 Me. 381; Low v. Smart, 5 N. H. 358; Lichtenhaler v. Thompson, 13 Serg. & R. Penn. 157.

whether the payment has actually been made. When the debtor or principal owes several debts, one of them with and the other without security, and then pays money to the creditor, it is in his power to say to which account the payment shall be applied.⁵⁴ The payment thus made binds the surety, and he cannot control the principal to make such application as he chooses.⁵⁵ But the right of the creditor or debtor to make the appropriation exists only when the payment is voluntary; it is only from the presumed assent of the debtor that the creditor can make the appropriation, and neither the debtor nor the creditor can make the application of the proceeds of a levy.⁵⁶ To release the surety, the payment must be such as discharges the debtor from his debt; for a payment made in counterfeit notes would not be valid.⁵⁷

The liability of a surety cannot be revived after he is once released by payment. Thus payment of a note by the principal releases the surety, and the note cannot be put in circulation against him.⁵⁸

1405. When the engagement is for the performance of a covenant, the surety is discharged the moment it has been performed by the principal. But if the obligation was to be discharged by the delivery of an article, say a horse, and the principal should deliver to the covenantee the horse of another, although at the time he thought himself the owner, this would not discharge the surety, nor, according to Pothier, would the surety be discharged if the thing delivered belonged to the covenantor or principal, if at the time he had no right to pass the title to it; as, if a person *non compos mentis* should deliver a horse of which he was the owner to the covenantee, after an inquisition found against him.⁵⁹

1406. As to the form and effect of a tender between the creditor and debtor, the reader is referred to another part of this work.⁶⁰ When the tender has been properly made by the principal, at the time or after the debt became due, the principal has performed all that the surety undertook he should do, and the latter is consequently discharged, for the creditor cannot, by a captious objection to receive what is due to him, continue the responsibility of the surety. But a tender not made according to law would not have this beneficial operation toward the surety.

1407. The term *set-off* has already been explained. By the common law this right did not exist, for, according to that system, mutual debts were distinct and inextinguishable except by payment or release.⁶¹ This differed from the compensation of the civil law, the principles of which are laid down with much precision in the Civil Code of Louisiana. By that code, "when two persons are indebted to each other, there takes place between them a compensation that extinguishes both the debts," in the manner and cases therein expressed. It "takes place, of course, by the mere operation of law, even unknown to the debtors; the two debts are reciprocally extinguished as soon as they exist simultaneously to the amount of their respective sums."⁶²

1408. But a right to set off does not, either under the statute 22 Geo. II c. 22, or those which have been enacted generally in the United States, extinguish the respective debts to the extent of the amount of the smaller. The only right the defendant in an action upon a contract has, when there have been mu-

⁵⁴ Before, 831.

⁵⁵ *Saunders v. Taylor*, 9 Barnew. & C. 35; *Pinnell's case*, 5 Coke, 117; *Collins v. Gwynne*, 9 Bingh. 544; *Gwynne v. Burnell*, 2 Bingh. N. C. 7.

⁵⁶ *Blackstone Bank v. Hill*, 10 Pick. Mass. 132.

⁵⁷ Before, 820.

⁵⁸ *Chapman v. Collins*, 12 Cush. Mass. 163.

⁵⁹ Before, 1115.

⁶⁰ Pothier, Obl. n. 496.

⁶¹ *Babington, Set-Off*, 1.

⁶² La. Civ. Code, art. 2203, 2204; *Commercial Bank v. Mayor, et al.*, 11 La.; *Morton v. Graham*, 11 La. 449; *Burge, Sur. B. 2, c. 6*.

tual dealings between the parties, is to plead the set-off. There exist, however, provisions in perhaps all the states where the principle of compensation has been adopted in certain cases. Under the bankrupt law of the United States, the debts between a bankrupt and his debtors are to be settled on the principle of compensation, and only the balance can be recovered.⁶³ Under the intestate laws of Pennsylvania, and perhaps other states, when the deceased was indebted at the time of his death, and had claims against his creditor, the difference only can be recovered.

1409. Whenever, in a proceeding by the creditor, the principal could, in equity, claim a right of set-off, the surety is entitled to the same benefit, because the proceeding against the surety is in effect a proceeding against the principal, who must indemnify the surety; thus, where a bill of exchange was drawn by D upon A, which A accepted for the accommodation of D, and D discounted the bill with his bankers, who became bankrupts before its maturity, having in their hands at the time of their bankruptcy the bill of exchange and also a cash balance of the drawer, the bill of exchange was ordered to be given up in reduction of the cash balance, leaving the drawer at liberty to prove the difference; for if an action had been brought against D, he would have had the benefit of a set-off, and he ought to have the same benefit if the action were against A, who, being merely D's surety, would have to be repaid by D.⁶⁴

1410. The surety may be released by the *acts of the creditor*; as, when he executes a formal release to the principal, the obligation of the surety is discharged. And a covenant not to sue, given to a sole debtor, has the same effect as a release, and may be pleaded in bar of any action for the enforcement of the original obligation. But a distinction must be made between a release and a covenant not to sue, when given to one of several joint debtors, so far as regards the rights of the surety. A formal release, under seal, to one of several joint debtors discharges the whole of them, and consequently relieves the surety from all liability, but the release in such case must be formal and under seal. But a covenant not to sue given to one of several joint debtors cannot be pleaded in bar to an action against the whole.⁶⁵ A surety will be discharged also, if the creditor for whose benefit the principal was bound to perform or make certain improvements on his land prevents such principal from making them.⁶⁶

If the undertaking of several sureties is joint and several, a release of one by the creditor leaves the co-sureties still liable for their proportionate share,⁶⁷ and the same rule is held in equity where the obligation is joint. The only effect is that the sureties are then relieved from the proportionate share which would fall on the surety released. But at law it would seem that a release of one of several joint sureties would discharge the whole.⁶⁸

The acts of the creditor may operate as a partial release of the surety. Thus a surrender of collaterals will discharge the surety only to the amount released,⁶⁹ and neglect to sue a debtor for one breach of the condition of a bond, if of any effect, does not discharge his sureties from their liability for other breaches.⁷⁰

1411. When the contract of the principal for which the surety undertook was

⁶³ See Act of Cong., March 2, 1867, sec. 20.

⁶⁴ Ex parte Hoppins, 2 Glyn & J. Bank. 93. See Collins v. Jones, 10 Barnw. & C. 777; Ex parte Stephens, 11 Ves. Ch. 24; Ex parte Hanson, 12 Ves. Ch. 316.

⁶⁵ Lacy v. Kynaston, 12 Mod. 548; 1 Ld. Raym. 688; Hutton v. Eyre, 6 Taunt. 288; Morley v. Friar, 6 Bingh. 547.

⁶⁶ Trustees v. Miller, 3 Ohio, 261.

⁶⁷ Klingensmith v. Klingensmith, 31 Penn. St. 460.

⁶⁸ See Jones v. Whitehead, 4 Ga. 397.

⁶⁹ Barrow v. Shields, 13 La. Ann. 57.

⁷⁰ Sacramento v. Kirk, 7 Cal. 419.

subject to a condition which has not been performed, or when the contract of suretyship, as between the creditor and the surety, is subject to a condition, the surety is discharged if that condition be not performed; as, if the surety engages to guarantee the amount of goods to be supplied to the principal, provided eighteen months' credit be given to him, and the creditor give him only twelve months' credit, and, after the expiration of six months more, he sue the surety on his guaranty, he will not be allowed to recover.⁷¹

1412. The creditor is required to act with regard to the surety so as to relieve him from the liability which he has incurred by receiving the debt from the principal whenever it is in his power; this is upon the plainest rule of justice. If, therefore, the principal dies, leaving an estate, and the creditor neglect to demand payment out of the same when he might have obtained it, the surety is discharged *pro tanto*.⁷²

1413. The surety is discharged from the obligation by the payment of the debt, or performance of the covenants made by himself, to the creditor or covenantee. But such payment does not discharge the principal; on the contrary, the surety is generally subrogated into all the rights of the creditor.⁷³ By *subrogation* is meant the act of putting by a transfer a person in the place of another, or a thing in the place of another thing. It is the substitution of a new for an old creditor and the succession to his rights which is called subrogation; *transfusio unius creditoris in alium*.⁷⁴ And, indeed, this right of substitution extends, not only against the principal, but against co-sureties; thus, one of three common sureties, who paid the debt of their common principal, may be subrogated to the rights of the creditor in the judgment paid by him to enable him to recover contribution from the other two.⁷⁵ But the party must be actually subrogated, and not merely rely upon his right of subrogation.⁷⁶

The rule of substitution applies only to cases where the plaintiff has been fully paid, for while something remains unpaid, the creditor has a right to retain the security.⁷⁷

1414. By the Roman law, the principles of which in this respect have been adopted in Louisiana,⁷⁸ the sureties are liable for the whole debt due to the creditor; but this liability is subject to three exceptions:

The creditor is generally bound to proceed by the process of discussion, that is, a proceeding by which the property of the principal debtor is made liable before resort can be had to the sureties; this is called the benefit of discussion.

Although each surety is bound for the whole debt, yet, when one of several sureties alone is sued, he has a right to have the debt apportioned among all the solvent sureties on the same obligation so that he shall be compelled to pay his own share only; this is called the benefit of division.

⁷¹ *Bacon v. Chesney*, 1 Stark. 129. See *Glynn v. Hertel*, 8 Taunt. 208; *Holl v. Hadley*, 5 Bingh. 54; *Ex parte Ashwell*, 2 Deac. & C. Bank. 281; *Campbell v. French*, 6 Term, 200.

⁷² *Ramsey v. Westmoreland Bank*, 2 Penn. 203. But see *Hooks v. Bank at Mobile*, 8 Ala. n. s. 580; *Vredenburg v. Snyder*, 6 Iowa, 39.

⁷³ *Sterling v. Forrester*, 3 Bligh, Hou. L. 590; *Deitzler v. Mishler*, 37 Penn. St. 98; *Hanner v. Douglass*, 4 Jones, Eq. No. C. 262; *Fawcetts v. Kimmey*, 33 Ala. n. s. 261. If the creditor holds an attachment on the debtor's property, the surety will be subrogated to his rights in the suit and attachment, and the debt will be regarded as unpaid so far as is necessary to enforce these rights. *Brewer v. Franklin Mills*, 42 N. H. 292. And a creditor who resorts to the surety is bound to preserve the principal debt for the surety's benefit. *Denny v. Lyon*, 38 Penn. St. 68.

⁷⁴ *Miller v. Ord*, 2 Binn. Penn. 382; *Neimcewicz v. Gahn*, 3 Paige, Ch. N. Y. 614.

⁷⁵ *Croft v. Moore*, 9 Watts, Penn. 451.

⁷⁶ *Rittenhouse v. Levering*, 6 Watts & S. Penn. 190; *Bank of Pennsylvania v. Potius*, 10 Watts, Penn. 148.

⁷⁷ *Kyser v. Kyser*, 6 Watts, Penn. 221; 10 Watts, Penn. 152; *Gannett v. Blodgett*, 39 N. H. 150.

⁷⁸ La. Civ. Code, art. 3014 to 3020.

But if the surety should pay the whole debt without insisting upon the benefit of division, then he has no recourse against his co-sureties unless upon payment he procured himself to be substituted to the original by cession, that is, an assignment by the creditor, in which case he might insist upon payment of a proper proportion from each of his co-sureties;⁷⁹ and in case of the insolvency of either of the sureties, the share of the insolvent is apportioned among the solvent sureties *pro rata*.⁸⁰

1415. *Fraud* by the creditor, or by the debtor or principal, with the knowledge or assent of the creditor, will discharge the surety from his liability, for it is not presumed he would have entered into it in the absence of such fraud. If the original obligation by the debtor can be avoided by fraud, the surety will also be discharged, it being a just maxim that fraud vitiates everything. The principle to be drawn from the cases seems to be this, "that if, with the knowledge or assent of the creditor, any material part of the transaction between the creditor and his debtor is misrepresented to the surety, the representation being such that but for the same having taken place, either the suretyship would not have been entered into at all, or, being entered into, the extent of the liability of the surety might be thereby increased, the security given is voidable on the ground of fraud."⁸¹

But the fraud which will avoid the suretyship may be not only against the surety; it may operate on others. A security given by a debtor in embarrassed circumstances to one of his creditors, in order to induce him to come in with other creditors into a composition, is void; and even when a surety is a party to this agreement, it will be void as to him upon grounds of public policy, though he be *particeps criminis*.

1416. *The act of limitation* is a complete bar to a recovery against a surety after the expiration of the proper time. But a question has been raised whether the principal could, by any acknowledgment of the debt, so far revive it as to render the surety responsible. It seems to be a rule, that when a debt is severed, the acknowledgment of one of his debtors cannot revive it against the other; as, where a joint debt is severed by the death of one of the joint debtors, it has been held nothing can be done by the personal representatives of the other to take the debt out of the statute as against the survivor.⁸² The debts of the principal and surety being severed, it would seem by analogy that the acknowledgment of the principal ought not to revive the liability of the surety; but it has been decided that it would have that effect, unless there had been collusion between the creditor and principal.⁸³

It is held in California that the guarantor may be held although the debt as against the principal is barred by the statute of limitations, the limitation applicable to the guaranty not being necessarily the same.⁸⁴

1417. When the duty to pay and the right to receive are in the same person, there is said to be a *confusion of right*; when, therefore, a man gives a note to a woman, with surety, and he afterward marries her, the surety is discharged, because the husband, as such, is entitled to the money due upon the note; un-

⁷⁹ Domat, 3, 4, 1; Pothier, Obl. n. 407, n. 519; Pothier, Pand. lib. 46, t. 1, art. 2, n. 45 to 51; Burge, Sur. 329, 343, 348; 5 Toullier, p. 544; 7 Toullier, p. 93.

⁸⁰ Domat, 3, 4, 2.

⁸¹ Stone v. Compton, 5 Bingham. N. C. 142, per Tindall, C. J.

⁸² Slater v. Lawson, 1 Barnw. & Ad. 396. See Atkins v. Tredgold, 2 Barnw. & C. 25; 3 Dowl. & R. 200.

⁸³ Angell, Lim. 272, 1st ed. See Burleigh v. Scott, 2 Mann. & R. 93; 8 Barnw. & C. 36; Burge, Sur. 284; Morgan v. Metayer, 14 La. Ann. 612; Perkins v. Barstow, 6 R. I. 505. But see Winchell v. Hicks, 18 N. Y. 558.

⁸⁴ Whiting v. Clark, 17 Cal. 407.

less, indeed, by the contract the man intended to make provision for his future wife, in which case a court of equity preserves the rights of the wife, though there is no remedy at law to enforce them.

1418. By the common law, the appointment of a debtor executor of the creditor discharged the debt, and, of course, the surety was no longer responsible. But in the United States generally the executor is now charged with the amount of the debt as assets.

1419. The *bankruptcy* or *insolvency* of the debtor does, under some systems of jurisprudence, discharge the obligation of the principal debtor and release him from all liability for provable debts; but even under those systems the original obligation generally remains in force against the surety. And when one of several co-sureties is discharged under those laws, as a bankrupt, the obligation still subsists against the others.

Bankrupt laws discharge the obligation of the debtor, but insolvent laws have no other effect than to relieve his person from arrest, the original debt being still subsisting against him.⁶⁵

The United States bankrupt law of 1867 leaves the surety still liable, although the debtor is bankrupt, allowing him to prove his debt if his liability is fixed. When a surety becomes bankrupt, the creditor may prove his claim against him.

1420. When the contract of the principal is altogether personal, as to accompany another on a journey, to serve him as a journeyman or apprentice, or to instruct an apprentice, and the contractor dies, the surety is fully discharged, except for violations or breaches of the contract before the death of the covenantor. But the contracts of a deceased person are not in general affected by his death; his executor or administrator is bound to fulfil them, and his surety is equally responsible as if he were living.

The death of a defendant before the bail is fixed discharges the bail; but when he dies after the return of a *ca. sa.*, the bail is fixed.⁶⁶

1421. Though the release of the principal will be a release of the surety, the converse of the proposition is not the law; the release of the surety does not release the principal, and he is at all times liable as if the surety had not been released. But when the debt is a joint one, and the creditor releases one of the principal debtors, he has no remedy against the other.⁶⁷ To have this effect, however, the release must be express and not a mere constructive release, as a covenant not to sue one of the obligors, for such covenant cannot be pleaded in bar to an action against two joint debtors, though it may be to prevent circuity of action where there is a sole debtor.

1422. The object of the contract of suretyship is the greater security of the creditor. As the surety is liable only for the default of the principal, that default must have taken place, and the creditor must have a right to sue the principal, before he can sue the surety. Until the time of payment or for the performance of the act has arrived, the principal cannot be sued and the surety cannot be made liable; if, therefore, the creditor is required to perform a condition precedent, he cannot demand the performance by either. An example will illustrate this. If the surety engage that his principal shall, from time to time, when required so to do by the creditor, duly account for moneys received by him, and that he shall pay any balance that may be due from him, the cred-

⁶⁵ *Ingraham, Insolv. passim.*

⁶⁶ *Boggs v. Teakle*, 5 Binn. Penn. 332; *Davidson v. Taylor*, 12 Wheat. 604; *Gordon v. Liepman*, 3 McCord, So. C. 49; *Bradford v. Earle*, 4 Pick. Mass. 120; *Goodwin v. Smith*, 4 N. H. 29; *Olcott v. Lilly*, 4 Johns. N. Y. 407.

⁶⁷ In New York, by statute, a creditor may release one of several joint debtors and retain his rights against the others.

itor, before he can compel the surety to pay any thing, must proceed to take an account; for the surety is not bound beyond the terms of his contract, and he is entitled to a strict performance of those terms.⁸⁸ And if the surety promise to pay the debt of the principal upon the failure of the latter, the same being previously requested of him, a previous request must be made by the creditor before suit.⁸⁹

Upon the same principle, the holder of a promissory note must make a demand of the maker, and give notice of non-payment to the indorser, before suit brought.

But when once the right of action has accrued, the creditor is not bound to sue the principal in the first instance, but may proceed against the surety, unless the surety became such on condition that the principal should first be sued.⁹⁰

As to the extent of the surety's liability, it is regulated by the contract itself. He cannot be made responsible beyond his engagement; and where he becomes bound by a bond, he can never be made liable beyond the penalty.⁹¹

The rights of the creditor against the surety do not extend merely to his personal liability. The creditor is also entitled to the benefit of all the pledges or securities given to, or in the hands of, a surety of the debtor for his indemnity, whether the surety is damnified or not, as it is a trust created for the better security of the debt and attaches to it.⁹²

1423. When treating of the extinction of the suretyship by the acts of the surety, we considered the right of the surety to be subrogated or substituted in the place of the principal, so that but little remains to be said here.

It is an open question whether the surety has any rights which he can enforce against the creditor before payment of the debt, that is, whether he can compel the creditor to enforce his debt against the principal debtor. The objection to allowing this is, that the surety can pay the debt when it becomes due, and at once become subrogated to the rights of the creditor. The better opinion is that, where courts exist with full equity jurisdiction, the surety may compel the creditor to enforce the principal debt when it becomes due, and the surety is discharged if the creditor does not enforce the principal debt upon the request of the surety.⁹³ But such a request must be accompanied by an offer to indemnify the creditor against costs and expenses.⁹⁴ This subject of notice and offer of indemnity has been made the subject of statutory provisions in many of the states.

1424. The surety has no *rights against the principal* until the debt becomes due and the principal is in default, except the passive right to be discharged in the manner before stated. But after default, the surety may by suit in equity compel the principal to discharge the debt and exonerate him from his liability.⁹⁵

When a person is security on a contract, there is an implied concurrent contract that the principal shall indemnify the surety; and the ground on which the court acts is, that when the money is due the equity arises, it being unrea-

⁸⁸ *Elworthy v. Maunder*, 2 Moore & P. 482; 5 Bingh. 295; *Antrobus v. Davidson*, 3 Mer. Ch. 569.

⁸⁹ *Alcock v. Browfield*, Noy, 95.

⁹⁰ *Gaddis v. Hawk*, 1 Watts. Penn. 280. See *Reynolds v. Rodgers*, 5 Ohio, 169.

⁹¹ *Briggs v. Cramer*, 2 South. N. J. 498; *Clark v. Bush*, 3 Cow. N. Y. 151; *Fairlie v. Lawson*, 5 Cow. N. Y. 424; *United States v. Boyd*, 15 Pet. 187; *Raney v. Baron*, 1 Fla. 327.

⁹² *Ohio Life Ins. Co. v. Ledyard*, 8 Ala. N. s. 866; *Roberts v. Colvin*, 3 Gratt. Va. 358.

⁹³ *Remsen v. Beekman*, 25 N. Y. 552; *Richards v. Commonwealth*, 40 Penn. St. 146.

⁹⁴ *Huey v. Pinney*, 5 Minn. 310.

⁹⁵ *Gilliam v. Esselman*, 5 Sued, Tenn. 86.

sonable that a surety should be for ever at the mercy of the creditor in respect of an engagement which ought to be performed by the principal.⁹⁶

1425. But if the surety *after default of the principal* pays the debt, then he at once acquires a right to sue the principal for what he has paid. It is important here to consider what payment will be sufficient to give this right of action. It must in the first place be compulsory. By this it is not meant that a suit must be actually brought, but the creditor must have acquired a legal claim against the surety which the latter cannot avoid; so that in general any payment by the surety after default of the principal is regarded as compulsory. But if the principal debt is barred by the statute of limitations, payment by the surety will give him no claim on the principal debtor, and the surety cannot waive any legal defence which discharges him from his liability.⁹⁷

1426. The payment need not be the actual payment in money of the debt. The surety may extinguish the principal debt in any other equivalent way, as by set-off, novation, or compromise.⁹⁸ It is a good payment if the surety pays the principal debt by giving his note, although the note is not paid at the time he sues the principal debtor.⁹⁹ But it is held that if the creditor has obtained judgment against the surety, for which the latter has given his note, he cannot sue the principal until the note is paid.¹⁰⁰

1427. If a surety holds any collateral security given by the principal, he may apply it to reimburse what he has paid,¹⁰¹ and, if this proves insufficient, may sue the principal for the balance. But he is not limited to this remedy unless so agreed, but may at once sue the principal for the whole amount without resorting to the security.¹⁰²

1428. Upon payment of the debt the surety is subrogated to the rights of the creditor, and is entitled to all the securities and remedies which the latter had against the principal. He may then have a variety of remedies, from which he may select which he pleases.

1429. When the surety has been compelled to pay the debt due to the principal, he may recover the amount he has paid, together with interest and costs.¹⁰³ And when he has voluntarily paid what was due, his right to recover is the same, but he cannot speculate upon his principal; where, therefore, he has compromised with the creditor, he can only recover what he has actually paid, and interest.¹⁰⁴

Upon the same principle, if the creditor, from a personal regard to the surety, made a gratuitous remission of the debt, it was held by the Roman law that the surety could not demand any thing from the principal debtor, who had profited by the remission, because it had cost the surety nothing.¹⁰⁵

But the surety has no right to be reimbursed when he has made a payment under an illegal engagement, to the illegality of which he was privy;¹⁰⁶ nor would

⁹⁶ *Ranlaugh v. Hayes*, 1 Eq. Ca. Ab. pl. 5; 1 Vern. Ch. 190; 2 Ch. Cas. 146; *Nisbett v. Smith*, 2 Brown, Ch. 579; *Hungerford v. Hungerford*, Gilb. Eq. 67.

⁹⁷ *Kimble v. Cummins*, 3 Metc. Ky. 327.

⁹⁸ *Pearson v. Parker*, 3 N. H. 366; *Hodgson v. Shaw*, 3 Mylne & K. Ch. 183; *Hulet v. Soullard*, 26 Vt. 295.

⁹⁹ *Washburn v. Pond*, 2 All. Mass. 474.

¹⁰⁰ *Bennett v. Buchanan*, 3 Ind. 47. Contra, *Pearson v. Parker*, 3 N. H. 366. And see *Ingalls v. Dennett*, 6 Me. 79; *Herndon v. Mason*, 4 J. J. Marsh, Ky. 575.

¹⁰¹ *Constant v. Matteson*, 22 Ill. 546; *McKnight v. Bradley*, 10 Rich. Eq. So. C. 557.

¹⁰² *Cornwall v. Gould*, 4 Pick. Mass. 444.

¹⁰³ *Wynn v. Brooke*, 5 Rawle, Penn. 106; *Burge*, Sur. 361.

¹⁰⁴ *Wynn v. Brooke*, 5 Rawle, Penn. 106; *Butcher v. Churchill*, 14 Ves. Ch. 567; *Reed v. Norris*, 2 Mylne & C. Ch. 361.

¹⁰⁵ See *Voet*, 46, 1, 23; *Dig.* 17, 1, 12.

¹⁰⁶ *Bryant v. Christie*, 1 Stark. 329. But see *Ford v. Keith*, 1 Mass. 138; *Johnson v. Johnson*, 11 Mass. 359; *Hargraves v. Lewis*, 3 Ga. 162.

he be entitled to recover from the principal if, in consequence of his neglect in informing the principal that he had paid the debt, the latter should pay it a second time to the debtor. All he could ask would be to receive a transfer of the rights of the principal to recover what has been paid to the creditor by mistake.¹⁰⁷

1430. In addition to the amount paid to extinguish the debt, the surety is entitled to recover his costs incurred in defending a suit against the creditor in good faith and upon reasonable grounds.¹⁰⁸ But he must not defend against a just claim against which he knows there is no defence. If he do so, he has no claim on the principal for the costs.¹⁰⁹

1431. When the surety has no written obligation from the principal, either that he will pay the debt or indemnify the surety, his only remedy at law is by an action of *indebitatus assumpsit*; for in such case there is an implied promise by law on the part of the principal to reimburse the surety the money so paid by him for the principal;¹¹⁰ but when the surety has taken from the principal any security upon which he may proceed for the recovery of the money paid by him, he must resort to the remedy adapted to the security which he has taken, and cannot maintain an action of *assumpsit*.

When joint sureties pay the debt, they may sue jointly,¹¹¹ or if each has paid his share, they may sue separately;¹¹² and if there are joint principals, the surety may recover the whole amount of any one of them.¹¹³

1432. When the undertaking of several sureties is joint and several, the creditor may recover the whole amount of any one, who is then entitled to his remedy for equal contribution against his co-sureties.¹¹⁴ A right to contribution exists whenever the undertaking is joint and not separate and successive, and it is immaterial whether the sureties are bound by the same instrument or by several distinct agreements.¹¹⁵

The right of contribution does not arise out of any contract between the parties, for it exists where the sureties have assumed the liability in ignorance of each other; it rests on the principle of natural justice that where several parties are equally subject to a common liability, it shall fall equally on all.¹¹⁶ But the sureties need not be equally bound; for one may limit his liability to a certain sum, and in that case he is not obliged to contribute any more.¹¹⁷ And the sureties may be separately bound for equal parts of the principal debt by separate agreements; in this case there is no contribution.¹¹⁸

If one surety holds any fund or collateral security to indemnify himself, his co-sureties are entitled to equal benefit from it;¹¹⁹ and a claim of a surety holding such security for contribution will depend upon his good faith and diligence in realizing such security, in default of which he will be charged with its amount.¹²⁰

¹⁰⁷ Voet, 46, 1, 33; Pothier, Obl. Art. 1, § 3.

¹⁰⁸ Downer v. Baxter, 30 Vt. 467.

¹⁰⁹ Holmes v. Weed, 24 Barb. N. Y. 546.

¹¹⁰ Toussaint v. Martinnant, 2 Term, 100.

¹¹¹ Appleton v. Bascomb, 3 Metc. Mass. 169.

¹¹² Peabody v. Chapman, 20 N. H. 418.

¹¹³ Apgar v. Hiler, 4 Zab. N. J. 812; Riddle v. Bowman, 27 N. H. 236.

¹¹⁴ McDonald v. Magruder, 3 Pet. 470.

¹¹⁵ Mayhew v. Crickets, 2 Swanst. Ch. 185; Claythorne, 14 Ves. Ch. 160.

¹¹⁶ Warner v. Morrison, 3 All. Mass. 566.

¹¹⁷ Pendlebury v. Walker, 4 Younge & C. Exch. 424; Walsh v. Bailie, 10 Johns. N. Y. 180.

¹¹⁸ Cowper v. Twynam, 1 Turn. & R. Ch. 426; McDonald v. Magruder, 3 Pet. 470.

¹¹⁹ Smith v. Conrad, 15 La. Ann. 579; Butler v. Birkey, 13 Ohio St. 514; Miller v. Sawyer, 30 Vt. 412; New Bedford Savings Inst. v. Fairhaven Bank, 9 All. Mass. 175.

¹²⁰ Schmidt v. Coulter, 6 Minn. 492; Paulin v. Kaighn, 5 Dutch. N. J. 480.

A surety is entitled to contribution for what he has actually paid in settlement; if he obtains a reduction by compromise, his co-sureties are entitled to an equal benefit in the reduction. He is not obliged to wait until he is actually compelled by suit to pay the debt;¹²¹ but on the other hand, if he defends a suit in good faith and on reasonable grounds, he may compel contribution for the costs of suit.¹²²

1433. The remedy for contribution may be either at law or in equity. Upon the equity of the case, the law raises an implied assumpsit on the part of the others to pay their shares, and on this an action of assumpsit may be brought against each co-surety. This action is old, and not of modern introduction. The remedy at law will in most cases secure substantial justice, but fails to give complete equality where one of several co-sureties is bankrupt. In this case the surety paying the debt can only recover of each one the same amount as if they were all solvent, and thus loses the bankrupt's share in addition to his own.

1434. In those states where courts of equity have the same powers which are inherent in a court of chancery in England, the remedy in equity is frequently more efficacious than that which is afforded in a court of law. By filing a bill in equity, the complainant can bring all the co-sureties before the court, and, by that means, a multiplicity of actions is prevented; and this proceeding will be indispensable when the surety requires a discovery of the persons who are his co-sureties, the instrument by which they became such, and the amount. This remedy is the only effectual means by which the quantum of contribution to be paid by each surety can be ascertained;¹²³ or where the sureties are each bound in distinct and several penalties;¹²⁴ or where one of the sureties has been obliged to pay, the second has become insolvent, and the third has been required to contribute ratably to the payment of the whole debt; because, as before observed, at law only one-third could be recovered from him,¹²⁵ while in equity the court will compel an equal contribution among the solvent sureties.

¹²¹ *Stallworth v. Preslar*, 34 Ala. n. s. 505.

¹²² *Fletcher v. Jackson*, 23 Vt. 581.

¹²³ *Birkley v. Presgrave*, 1 East, 220.

¹²⁴ *Collins v. Prosser*, 1 Barnew. & C. 682.

¹²⁵ *Peter v. Rich*, 1 Chanc. Cas. 34; *Hole v. Harrison*, 1 Chanc. Cas. 246; *Browne v. Lee*, 6 Barnew. & C. 689; *Cowell v. Edwards*, 2 Bos. & P. 268.

CHAPTER XIII.

PARTNERSHIP.

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1435. Partnership or co-partnership is an agreement between two or more competent persons for joining their money, goods, labor, and skill, or either or all of them, for the purpose of advancing fair trade and of dividing the profits and losses arising from it, proportionably or otherwise, between or among them.¹ Sometimes the term partnership signifies a moral being composed of the reunion of all the partners.²

1436. A distinction must be observed between a partnership and a corporation; a partnership may be composed of any number of persons, by the simple agreement and consent of the parties; for all associations to transact business for the common benefit, with the common stock or capital, formed by the voluntary acts of the parties alone, are partnerships. A corporation cannot be formed by the voluntary act of the parties alone, but must be specially sanctioned by a special law, creating a body politic. In this case, although they have contributed to the general fund and are entitled to the profits, the members are not partners. The corporation exists independently of the particular persons who compose it, and its property alone is responsible for its liabilities.

1437. A partnership is also to be distinguished from a tenancy in common, and from a joint tenancy.

Part owners of chattels differ essentially from partners. They are either joint owners, or tenants in common, each having an independent, although an undivided interest in the property; and neither can dispose of or transfer the whole property without the consent of his companion; but each can sell his own share or interest in it, and the purchaser will stand in the place and possess the rights of the seller, whereas in a partnership one can dispose of the whole of the joint property; and if he should sell only one part, or his interest in it, the purchaser would take only the rights of the seller after a full settlement of the partnership debts.

1438. In this chapter we shall consider, 1, the essential character of a partnership; 2, the capital stock; 3, the different kinds of partnership; 4, the liabilities of partners to third persons; 5, the rights of partners against third persons; 6, the dissolution of the partnership.

1439. A great number of questions which may arise on this subject may be solved if we clearly understand how the agreement among the partners is formed, who are the partners, who are to administer the partnership property, the community of interest.

1440. To constitute a partnership there must be an agreement among the

¹ Story, Partn. § 2; Watson, Partn. 1; Gow, Partn. 2; Pothier, Pand. lib. 17, t. 2, in pr.; Collyer, Partn. 2; Montague, Partn. 1; Pothier, De Société, art. prélim. n. 1; Domat, Civ. Law, B. 1, t. 8, art. prélim.; Code Civil, art. 1832; La. Civ. Code, art. 2772; 5 Duvergier, Dr. Civ. Fr. t. 9, c. 1, n. 17; 4 Pardessus, Dr. Com. n. 966; 2 Bell. Comm. 611, 5th ed.; Aso. & M. Inst. Laws of Spain, B. 2, t. 15.

² 4 Pardessus, Dr. Com. n. 966.

partners, and *an intent* to form such contract; for there can be no partnership without such intention. This circumstance distinguishes this contract from numerous relations which may arise between the parties from the mere operation of law, independent of contract; for example, there may be a community of interest created by law between the parties which is not a partnership.³ Joint tenants, or tenants in common of lands, or goods and chattels, under devises and bequests in last wills, or donees *inter vivos*, or distributees under the intestate laws, though having a common interest, are not partners. Every community of goods does not create a partnership, though in every partnership there is a community of interest; to give rise to such a relation, there must be an agreement that it shall exist.⁴

A partnership can commence only by the voluntary consent of the parties; so that when it is once formed, it remains the same until it is dissolved.

Being a contract, a partnership is liable to all the rules which require contracts to be made in good faith and clear of fraud, that they be legal, and contain all the essential elements of a lawful agreement. If a partnership be formed for immoral or illegal purposes, or if it be in contravention of the positive law or the public policy of the country, it will be considered void; as, if it be for illegal gaming, illegal insurances, or wagers, to carry on a contraband trade, or the slave trade, or to support a house of ill-fame, or any such unlawful purpose, it will be a mere nullity.⁵ The reason for this is clear; it is that a partnership cannot subsist for the purpose of doing unlawful things, as the partners cannot, in such case, unite or bind themselves to each other.

1441. We shall consider who may be partners and the several kinds of partners.

The persons who compose a partnership are severally called partners, and, taken collectively, they constitute a partnership or a firm.

Every person *sui juris* is competent to contract the relation of a partner; and even those whose contracts are only voidable may become partners, as in the case of infants, whose contracts are voidable when they are of an uncertain nature as to their benefit or prejudice.⁶ Persons of unsound mind cannot enter into any contract, and consequently cannot become partners. Alien enemies are incapable of becoming partners, though there is no doubt alien friends may enter into the contract of partnership. A married woman is incapable by the common law of forming any contract whatever; there are, however, exceptions to this rule, even at common law. By the custom of London, and in some states, by virtue of statutes a married woman may be authorized to carry on trade as a *feme sole*.⁷ In the civil law, the relation of husband and wife is very different from that which these parties sustain toward each other by the common law. In the civil law the husband and wife are considered as two distinct persons, and may have separate estates, contracts, debts, and commit or suffer several injuries;⁸ but still, the wife cannot make binding contracts without the consent of her husband and his authority, and the husband is the sole administrator of the property which they hold in community. When authorized by him to act

³ *Sayer v. Frick*, 7 Watts & S. Penn. 383.

⁴ Pardessus, Dr. Comm. n. 969; Pothier, de Société, n. 2; Story, Partn. § 3.

⁵ Gow, Partn. 7, 8; Watson, Partn. 35 to 46; 1 Bell. Comm. 297, 5th ed.; 5 Duvergier, Dr. Civ. Fr. n. 24, 25; Dig. 27, 3, 1, 14; Dig. 17, 2, 53; Pothier, Pand. 17, 2, 5 and 18.

⁶ Story, Eq. Jur. § 240; Story, Partn. § 7; *Keane v. Boycott*, 2 H. Blackst. 511.

⁷ See Collyer, Partn. 15; *Burke v. Winckle*, 2 Serg. & R. Penn. 189; *Gregory v. Pierce*, 4 Metc. Mass. 478. In many of the states married women are allowed under certain regulations to carry on business as if they were unmarried and may be partners; in others they are restricted from forming partnerships, though allowed to trade as *femes sole*.

⁸ 1 Sharswood, Blackst. Comm. 444.

as a sole trader, she may make herself liable for all the concerns of her mercantile transactions, and it is supposed that by his authority she may become a partner. The French law contains the same provisions, and the civil code of Louisiana coincides with it.⁹

1442. An infant may form a contract of partnership as he may form any other contract which may be for his benefit.¹⁰ It will be governed by the same rules as other contracts, the other parties are bound, but the infant within a reasonable time after coming of age may confirm or avoid it.¹¹ A corporation acting within its powers may be a partner.¹²

1443. When the partnership has once been formed, it must remain as it was made, as far as regards the partners, until it has been dissolved. It is of the essence of this contract that the partners should choose each other; no partner, therefore, can force his co-partner to receive another person into the firm; and the dissent of a single partner will exclude him;¹³ otherwise the exercise of such a right by one, or a majority of the partners, would change the nature, terms, and obligations of the original contract, and take away the *delectus personarum* which is so essential to the constitution of a partnership.¹⁴ But the articles of partnership may make a provision upon the subject, and, in that case, a third person may become a member of a firm, without any other consent of the partners; as, where it is provided, that on the death of one of the partners, his executors shall carry on the business with the survivors.¹⁵

1444. Partners are considered as ostensible, nominal, and dormant.

1445. An actual, *ostensible partner* is one who not only participates in the profits and contributes to the losses, but who appears and exhibits himself to the world as a person connected with the partnership, and as forming a component member of the firm. He is clearly answerable for the debts and engagements of the partnership; his right to a share of the profits, or the permitted exhibition of his name as a partner, would be sufficient to render him responsible.

1446. A *nominal partner* is one who has not any actual interest in the trade or its profits, but by allowing his name to be used, holds himself out to the world as having an apparent interest. He is liable as partner to third persons, because of the false appearance he holds forth to the world in representing himself to be jointly concerned in interest with those with whom he is apparently associated. But a nominal partner is not responsible to the other partners for any losses which they may sustain.

But in order to charge one as a nominal partner his name must have been used with his consent;¹⁶ and it must be shown that he has held himself out as a partner to the party contracting, that is, that the creditor of the firm must have known of the use of his name.¹⁷

1447. A *dormant partner* is one who participates in the profits of the trade or business, but his name being concealed or suppressed in the firm, his interest is consequently not apparent. He is liable as a partner, because he receives and takes from the creditors a part of that fund which is the proper security to

⁹ La. Civ. Code, art. 121-131.

¹⁰ Furlong v. Bartlett, 21 Pick. Mass. 401.

¹¹ Breed v. Judd, 1 Gray, Mass. 455; Richardson v. Boright, 9 Vt. 368.

¹² Holmes v. Old Colony R. R., 5 Gray, Mass. 58.

¹³ Griswold v. Waddington, 15 Johns. N. Y. 82; Channel v. Fassitt, 16 Ohio, 166.

¹⁴ Collyer, Partn. 8; Crawhay v. Maule, 1 Swanst. Ch. 508.

¹⁵ Collyer, Partn. 9; 2 Bell, Comm. 5th ed. 634; Scholefield v. Eichelberger, 7 Pet. 586.

¹⁶ Leavitt v. Peck, 3 Conn. 324.

¹⁷ Young v. Smith, 25 Mo. 341; Benedict v. Davis, 2 M'Lean, C. C. 347.

them for the satisfaction of their debts, and upon which they rely for payment.¹⁸ Another reason assigned for subjecting a dormant partner to responsibility is, that if he were exempted, he would receive usurious interest for his capital, without its being attended with any risk. But a dormant partner is not liable for the debts of the firm, contracted after he has withdrawn from the partnership and has ceased to receive the profits of the business.¹⁹

And if the dormant partner withdraws from the partnership, it is not necessary to give any notice to the creditors of the firm, except to such creditors as actually knew him to be a partner;²⁰ with respect to such he is really an ostensible partner.²¹

1448. In order to constitute such a community of profits as to render a person who receives them liable as a partner, such a person must receive them as a principal; because if he be a mere agent, factor, or servant, receiving in lieu of wages a sum proportioned to the profit gained by his employer, he will not be held responsible to third persons as a partner, for there is a distinction between receiving the profits as such and a commission on the profits, and although this seems, at first sight, but a flimsy distinction, it appears to be a well settled rule of law.²² The Roman law,²³ the French,²⁴ and the Scottish law,²⁵ recognize the same distinction.

1449. As a general rule, partners, strictly speaking, cannot sell their interest in their partnership so as to give the assignee the rights of a partner with the others; and an assignment of such interest, without the consent of the other partners, would operate a dissolution of the partnership, and the assignee would become a tenant in common of the partnership property with the other partners; if the others consented, it would, to all intent and purposes, be a substitution of the new for the old partnership.²⁶ In making such assignment or transfer, the partner can convey no more right than he possessed; his share in the partnership was subject to the payment of the partnership debts, his assignee will therefore take a transfer of his share with his liability for the payment of those debts.²⁷

When a right is reserved to a partner, in the articles of partnership, to assign his rights to another, who shall be entitled to admission as a partner, he of course may do so, and the assignee will be a partner; but in that case the old partnership will be considered dissolved, and a new one substituted in its place. In a case of this kind, the party having a right to assign will be required to act in good faith, and not from caprice; an assignment to a person of no com-

¹⁸ *Dob v. Halsey*, 16 Johns. N. Y. 40. See *United States Bank v. Binney*, 5 Mas. C. C. 175; *Hoare v. Dawes*, 1 Dougl. 371; *Winship v. Bank of U. S.*, 5 Pet. 529; *Etheridge v. Binney*, 9 Pick. Mass. 272.

¹⁹ *Armstrong v. Hussey*, 12 Serg. & R. Penn. 315; *Grosvenor v. Lloyd*, 1 Metc. Mass. 19; *Kelley v. Hurlburt*, 5 Cow. N. Y. 534.

²⁰ *Kelley v. Hurlburt*, 5 Cow. N. Y. 534; *Grosvenor v. Lloyd*, 1 Metc. Mass. 20; *Cregler v. Durham*, 9 Ind. 375.

²¹ *Davis v. Allen*, 3 N. Y. 168.

²² *Miller v. Bartlett*, 15 Serg. & R. Penn. 157; *Dunham v. Rogers*, 1 Penn. St. 255, 262; *Collyer, Partn.* 31; *Cary, Partn.* 11; *Burckle v. Eckart*, 1 Den. N. Y. 337; *Vanderburgh v. Hull*, 20 Wend. N. Y. 70; 3 C. B. 32; *Dwinel v. Stone*, 30 Me. 384; *Ambler v. Bradley*, 6 Vt. 119; *Loomis v. Marshall*, 12 Conn. 69; *Lowry v. Brooks*, 2 M'Cord, So. C. 421; *Smith v. Perry*, 5 Dutch. N. J. 74; *Berthold v. Goldsmith*, 24 How. 536; *Macy v. Combs*, 15 Ind. 469.

²³ Dig. 17, 2, 44; *Pothier, Pand.* 17, 2, 4.

²⁴ 5 *Duvergier*, Dr. Civ. Fr. n. 48; 17 *Duvergier*, Dr. Fr. n. 332; *Pothier, Du Contrat de Société*, n. 13.

²⁵ *Burton, Man. P. L.* 178; *Marquant v. N. Y. Man. Co.*, 17 Johns. N. Y. 525; *Ketchum v. Clark*, 6 Johns. N. Y. 144.

²⁶ *Story, Partn.* § 307.

²⁷ *Young v. Kecghly*, 15 Ves. Ch. 567.

petent skill and honesty would be an abuse, and not a fair exercise of the right of assignment.²⁸

1450. It will be remembered that part owners of a chattel may be simply tenants in common, without being partners; as, if two persons buy a horse, a ship, or any other chattel. In this case, each may sell his share or interest, and the purchaser will be a tenant in common with the other.

1451. In the above definition it has been stated that a partnership is a moral being composed of a reunion of all the partners. As a partnership has a separate existence as a person, it may make engagements, and the partners, individually, are bound to fulfil them, only on its default, as sureties.²⁹

A firm may make contracts of every kind which the individual partners might have entered into, and with all persons, even with the partners themselves in their individual capacity, and the latter are to be considered among the partners as third persons, though with regard to other creditors of the partnership they are not entitled to be paid until such creditors have been satisfied all their claims.³⁰ The reason of this is that the creditor partner is bound with his associates to discharge all the debts of the partnership; and he will not be allowed to take any of its assets to pay himself to the exclusion of a stranger, a creditor of the firm. One of the partners may sell to the firm of which he is a member, or lend to it, subject to the above qualifications, as a third person might do.

The partnership acts always in the name of the firm, and, when so acting, it does not act for the individual partners separately; for example, an insurance made in the name of Peter and Company, on goods on board of the ship *America*, will not cover goods belonging to Peter alone, however general the words of the policy may be.

On the same principal, a contract made with a member of the firm, in his individual capacity, is not binding on the partnership, the creditor of the separate partner having a right only against the share of the debtor partner, which he may cause to be sold on execution.³¹

Each partner is considered individually as distinct from the firm of which he is a member, and therefore the accidents which may happen to one have no effect upon the other; a member of a firm may be insolvent, and the firm solvent, or *vice versa*. Upon the same principle, when one or more individuals are members of several firms, the failure of one of them does not affect the others; for the creditors of one firm cannot claim the assets of the other, but can only make available, to the satisfaction of their claims, the share which the partner in both firms has in that which is solvent.

1452. By the very nature of things each one of the partners has an equal right to the management of the affairs of the firm, of which he cannot be deprived unless he has willingly parted with it and confided it to others. The right to manage their affairs may have been vested in some particular partners to the exclusion of the rest; in such case, those only have this right in whom it is vested.³² But this rule is limited to the partners themselves, for with regard to third persons, who acquire rights by the acts of persons not so authorized,

²⁸ Collyer, Partn. 129; 1 Bell, Comm. 620, 5th ed. But see *Jeffreys v. Smith*, 3 Russ. Ch. 158.

²⁹ 2 Bell, Comm. 5th ed. 619.

³⁰ Gow, Partn. 3d ed. 75; Story, Partn. § 219.

³¹ But a note signed by the partners with their individual names binds the firm. *Maynard v. Fellows*, 43 N. H. 255.

³² Story, Partn. § 101; 3 Kent, Comm. 40, 4th ed.; Collyer, Partn. 259, 2d ed.; U. S. Bank v. Binney, 5 Mas. C. C. 176; 5 Pet. 529.

they are not affected by any such provisions, unless they know that such restriction has been made.³³

In the absence of all stipulations expressed, each partner, *virtute officii*, possesses an equal and general power and authority on behalf of the firm to transfer, pledge, exchange, or apply, or otherwise dispose of, the partnership property and effects, for any and all lawful purposes within the scope and objects of the partnership and the usual course of its trade and business.³⁴ As a general assignment for the benefit of creditors is not within the usual course of its business, it may be well doubted whether such assignment by one of the partners only is within his powers.³⁵

1453. There are various restrictions of this general rule that partners, unless limited, have each the general authority to manage the estate; among them are the following:

The right of each of the partners to manage the concerns of the firm is restricted to personal property; it does not extend to real estate held by the partnership; this, among others, for technical reasons, it being a rule of law that a partner cannot in general make any contract by deed which shall be binding on his co-partners,³⁶ because the partner is considered as an agent of his co-partners, and not being authorized by deed, he cannot bind his co-partner by deed.³⁷ But this rule admits of some qualifications.³⁸

A partner cannot in general submit a matter in dispute to arbitration when it concerns or arises out of the partnership business, for various reasons: it is not within the scope of the business; the award may require partners to perform acts which they would not otherwise be required to perform; and, what is perhaps the soundest reason, it would take away the jurisdiction of the courts without the consent of all the partners.³⁹

Although one partner may procure advances of money to carry on the business of an established partnership, yet if the partnership is not established, one partner has no implied authority to bind the firm for advances, in its incipient state, to raise a capital for its use.⁴⁰

1454. When there are stipulations in the articles of partnership as to the persons who shall manage its concerns, the partners are bound by such agreement. In their absence the general rule is that each partner has an equal voice, and a majority, acting *bona fide*, have the right to manage the partnership concerns and dispose of the partnership property, notwithstanding the dis-

³³ *Hawker v. Bourne*, 8 Mees. & W. Exch. 710.

³⁴ Story, Ag. § 37, 39, 124; Story, Partn. § 101; Collyer, Partn. 129; 2 Bell, Comm. 615, 5th ed.

³⁵ *Pierpont v. Graham*, 4 Wash. C. C. 233; *Dana v. Lull*, 17 Vt. 390; *Hughes v. Ellison*, 5 Mo. 463; *Dickinson v. Legare*, 1 Des. Eq. So. C. 537; *Kirby v. Ingersoll*, 1 Dougl. Mich. 477. The cases which tend to support the validity of such an assignment are *Anderson v. Tompkins*, 1 Brock. C. C. 456; *Havens v. Hussey*, 5 Paige, Ch. N. Y. 30; *Tapley v. Butterfield*, 1 Metc. Mass. 515; *M'Culloch v. Summerville*, 8 Leigh, Va. 416. See Story, Partn. § 101; Collyer, Partn. § 395.

³⁶ *Watson*, Partn. 218; *Gow*, Partn. 83; Story, Partn. § 117.

³⁷ See *Hughes v. Ellison*, 5 Mo. 463; *Tapley v. Butterfield*, 1 Metc. Mass. 515; *Piatt v. Oliver*, 3 M'Lean, C. C. 27; *Galbraith v. Gedge*, 16 B. Monr. Ky. 631.

³⁸ *Bond v. Aitkin*, 6 Watts & S. Penn. 165.

³⁹ *Comyn*, Dig. *Arbitrament*, D 2; *Karthaus v. Ferrer*, 1 Pet. 222; *Buchanan v. Curry*, 19 Johns. N. Y. 137; *Stead v. Salt*, 3 Bingh. 101; 2 Bell, Comm. 5th ed. 615; *Wood v. Shepherd*, 2 Patt. & H. Va. 442; *Jones v. Baley*, 5 Cal. 345. In Pennsylvania a partner may refer a partnership matter to arbitration by an unsealed instrument. *Taylor v. Corryell*, 12 Serg. & R. Penn. 243; and the same rule prevails in Kentucky. *Southard v. Steele*, 3 T. B. Monr. Ky. 433.

⁴⁰ *Fisher v. Taylor*, 2 Hare, Ch. 218; *Brown v. Gibbons*, 5 Brown, Parl. Cas. 491; *Smith v. Craven*, 1 Crompt. & J. Exch. 500.

sent of the minority; but in every case when the minority have a right to give an opinion, they ought to be notified.⁴¹

1455. In case of an equal division among partners, there is a suspension of the right of each to carry on the business with regard to all persons having notice of the disagreement.⁴² But it may happen that there are more than two propositions about which the partners are divided; for example, if of twelve partners there should be five in favor of one measure, four in favor of another, and three in favor of the last, the first would have the plurality of the partners, but not the majority. In such case the question is, What is to be done? According to Pardessus,⁴³ no action can be had by either set of partners.

1456. It is one of the essential characteristics of a partnership that the property brought into it is put into community by the joint consent of all the parties. When property is furnished by one as capital, the moment it becomes subject to the partnership it belongs to the whole of the partners; the profits which it yields are joint profits, and the loss must be borne by the firm; if it should be destroyed, it is the loss of the partnership upon the principal which governs such cases, *res perit domino*. It is liable for the payment of the partnership debts, and these would have a preference, even over the creditors of the partner who furnished such property as capital.⁴⁴

There must always be a community of interest in the profits of the business of the partnership, that is, a joint interest in those profits, for the very object of that contract is the common interest of the parties.⁴⁵ And if the agreement of the parties was that all the profits should belong to one only, the contract would not be a partnership, but a mandate, or an engagement of another nature.⁴⁶ In the absence of all agreement, the profits and losses are to be enjoyed or borne according to their respective proportions of the capital furnished. It is not necessary that they should have an equal share of the profits; it is sufficient if they share the net profits according to their respective proportions. In the absence of all agreements and circumstances, they are to share the profits and losses equally, for in such equality is equity.⁴⁷

But it is not necessary that both circumstances, namely, a community of interest and a community of profits, should exist in order to create a partnership, for if the whole capital stock belongs to one of the partners, and by agreement is to remain his exclusive property, still, if there is a community of profits and losses, there will be a partnership.⁴⁸

1457. Among the partners themselves there is no difference whether the partnership property held for the purpose of trade or business consists of personal or movable property, or of real estate, or both, so far as their ultimate rights and interests in it are concerned. This distinction, however, must be observed, that at law real estate is deemed to belong to the persons in whose name the title by conveyance stands; whether it be in the name of a stranger or of one of the partners, he is deemed the sole owner, and he alone can make a conveyance of it; it is not, therefore, in this respect, to be considered as partnership property. If it be in the names of several of the partners, they are

⁴¹ *Const v. Harris*, Turn. & R. Ch. 496; *Kirk v. Hodgson*, 3 Johns. Ch. N. Y. 400.

⁴² *Willis v. Dyson*, 1 Stark. 164.

⁴³ 4 Pardessus, Droit Com. n. 980.

⁴⁴ *Holden v. McMakin*, 1 Pars. Eq. Cas. Penn. 270, 277. See *Coke*, Litt. 182; *Collyer*, Partn. 65.

⁴⁵ *Collyer*, Partn. 11; *Gow*, Partn. 1; *Pothier*, De Société, n. 12.

⁴⁶ *Pothier*, De Société, n. 12; *Waugh v. Carver*, 2 H. Blackst. 235.

⁴⁷ *Peacock v. Peacock*, 16 Ves. Ch. 49; *Gould v. Gould*, 6 Wend. N. Y. 263. But see *Thompson v. Williamson*, 7 Bligh, Hou. L. 432; 5 Wils. & S. Hou. L. 16; *Farr v. Johnson*, 25 Ill. 522; *Moore v. Bare*, 11 Iowa, 198.

⁴⁸ *Ex parte Hamper*, 17 Ves. Ch. 404.

treated as the owners at law, and are joint tenants, or tenants in common, according to the terms of the conveyance.⁴⁹ But whatever may be the title at law, the real estate will be treated in equity as belonging to the partnership, like personal funds, and disposable accordingly. The persons who hold the legal title will be considered as trustees of the partnership, and accountable accordingly.⁵⁰

With regard to their creditors, partnership property is considered as personality, and so treated for their benefit; and when it has been impressed with the character of personality by the agreement of the partners themselves, it will be so considered for the purpose of distribution.⁵¹

1458. In the definition given of partnership, it is said to be joining the money, goods, labor, and skill of the partners, so that each must put something into the firm which is capable of procuring some profit or benefit for the use of the whole. What is thus put in is called *contribution* or *stock*; and all the stock united, forms the *assets* of the firm. The discussion of this subject will lead us to consider the necessity of furnishing stock, of what the stock brought into the partnership shall consist, how the stock of each partner shall be ascertained, of the obligation of each partner to furnish what he has promised, of the effect of putting stock into the firm.

1459. One cannot be a member of a partnership without contributing something toward it. If an agreement were made with an individual that he should have a certain portion of the profits without furnishing either capital or services, this would be an agreement to give him such interest, and would not be strictly a partnership between the parties, however they might perhaps be made responsible to third persons.

1460. The stock put into the firm must not be put in under conditions which are repugnant to the contract of partnership; as, if A should put one thousand dollars into a firm on condition that he should be at liberty to withdraw it at any time, with interest, this would be only a loan; because he would not be entitled to profits, and the property never entered into community otherwise than as a loan.

1461. Every thing which is susceptible of being the object of an agreement may form a part of the stock which a partner may furnish toward the capital of the firm. Thus a partner may furnish or promise merchandise, goods, sums of money, or credits. In general, the stock which a partner furnishes is considered as being free from the claim of others, but the nature of the things may sometimes of itself modify the rights which the partnership may acquire over such things; thus, when the stock which he furnishes consists of real estate, subject to a mortgage or other lien, the creditors will have a claim against it, as they would have had against a purchaser.

A production of the mind, as the use of a patent right for an invention, or a copy right of a book, may be put in by one partner as stock to the capital of the firm. For the same reason, manual labor, skill and knowledge in the conducting of business may be put in as stock toward the social capital.

⁴⁹ *Anderson v. Tompkins*, 1 Brock. C. C. 456, 465; *Coles v. Coles*, 15 Johns. N. Y. 159; *McDermott v. Lawrence*, 7 Serg. & R. Penn. 438; *Smith v. Jackson*, 2 Edw. Ch. N. Y. 23; *Yeatman v. Woods*, 6 Yerg. Tenn. 20.

⁵⁰ *Story*, Eq. Jur. § 674; *Bisset*, Partn. 48; *Sigourney v. Munn*, 7 Conn. 11; *Greene v. Greene*, 1 Ohio, 535; *Hoxie v. Carr*, 1 Sumn. C. C. 173; *Baird v. Baird*, 1 Dev. & B. Eq. No. C. 524; *Dyer v. Clark*, 5 Metc. Mass. 562; *Beaman v. Whitney*, 20 Me. 413; *Tillinghast v. Champlin*, 4 R. I. 173; *Matlack v. James*, 2 Beasl. N. J. 126; *Nicoll v. Ogden*, 29 Ill. 323; *Fowler v. Bailey*, 14 Wisc. 125; *Arnold v. Wainright*, 6 Minn. 358; *Clagett v. Kilbourne*, 1 Black, 346; *Collumb v. Read*, 24 N. Y. 505; *Erwin's Appeal*, 39 Penn. St. 535; *Dupuy v. Leavenworth*, 17 Cal. 262; *Cilley v. Huse*, 40 N. H. 358; *Indiana Co. v. Bates*, 14 Ind. 8.

⁵¹ *Story*, Partn. § 93.

One partner may contribute goods or property only, and the other skill or services only.⁵² It is not necessary that the actual title to any property should be vested in the partnership; a partner may contribute merely the use of his property,⁵³ or the partnership may merely have the use or management of property owned by others.

1462. It seldom happens that the partners do not themselves fix the amount of stock which each is to furnish. In the absence of all agreement, when they have been silent upon the subject, the presumption is that each has furnished an equal share.

1463. As, in general, the proportion in the profits and losses is governed by the amount of the stock furnished, it is very important not to confound the amount put in by a partner as stock and the advances he may make to the firm. It sometimes happens that one of the partners undertakes to lend to the firm a certain sum of money, for which he is to charge interest; and not unfrequently there is no express contract to that effect, and yet the partner makes advances; in this case such advances shall not be considered, as between the parties, as stock furnished. An example will show the importance of this rule. Suppose A and B enter into partnership; the former puts in stock twenty thousand dollars, the latter ten thousand dollars. The firm apply the whole of the capital to purchase from their correspondent in Paris merchandise to that amount. On the arrival of the goods in the United States, B who resides here, receives the goods, and advances ten thousand dollars to pay for their freight, custom-house duties, and other expenses. The sales produce fifty thousand dollars after deducting all charges for selling; in this case, B will not be considered an equal partner with A, notwithstanding he has furnished the same amount of money which has gone into the partnership funds. He is to be paid first the ten thousand dollars he advanced for freight, duties, etc., and the interest on that sum, and the surplus is to be divided into three parts, one of which will belong to B and the remainder to A.

1464. The partners are respectively bound to furnish what they have individually promised to put into the partnership at the time agreed upon.

1465. When there has been no special agreement, it is presumed that the parties intended that which, from the nature of things, is the most apparent. If merchandise has been promised, it must be delivered in the quantity and of a quality which shall be merchantable, as he would be bound to do toward a purchaser. If rights have been promised, the partner is bound to facilitate their transmission by the requisite indorsements. If the stock he is to furnish consists in the communication of certain discoveries, or of his labor, skill, or industry, he is bound to furnish them to the extent of his express engagement, where there is one, or, if there be none, according to the nature of things. If he has promised to furnish a certain sum of money, he is bound to furnish it at the time appointed, or, if there be no time fixed, then without delay. In all such cases the party contracting is treated as a debtor to the firm to the full amount so to be contributed or paid, from the time when the same became due, as *debitum in presenti, solvendum in futuro*. A court of equity will consider him with regard to such debts precisely in the same relation to them as if he were a third person who was a debtor to the partnership.⁵⁴

1466. When a partner has promised to put into the partnership a certain determinate article, as a house, one hundred bales of cotton, and the like, he is presumed to guarantee the title to the partnership according to the extent and

⁵² Bromley v. Elliott, 38 N. H. 308; Brigham v. Dana, 29 Vt. 1.

⁵³ Dwinel v. Stone, 30 Me. 385; Champion v. Bostwick, 18 Wend. N. Y. 183.

⁵⁴ Story, Partn. § 203; Collyer, Partn. § 216; Akhurst v. Jackson, 1 Swanst. Ch. 89.
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the terms of his agreement. If he should put in one hundred bales of cotton, and a third person should afterward bring an action of replevin against the partnership and recover the cotton, the loss would be that of the partner, because in truth he never put his own cotton which he promised into the firm, but the cotton of another. But if the title of the partner to the cotton had been perfect, the moment it was received by the partners it would belong to the firm; and should it afterward be consumed by fire, the loss would be that of the firm; for the loss of the property is to be borne by the owner: *res perit domino*.

1467. If the partner had purposely put in the cotton of another as his own, this would be such a fraud as would probably induce a court of equity to decree a dissolution of the partnership.⁵⁵ And, perhaps, when there was no fraud, but the object of the partnership would be totally lost or greatly injured, the court might make such a decree; as, where the partner had in good faith put in a patent right as his share of the capital stock for the purpose of enabling the firm to manufacture the patented article, and, owing to a want of formality, the patentee had acquired no right to his patent and it had become public.

1468. There are several *kinds of partnerships*. They are universal, general, and special or limited, when considered as to the property which is employed by the partners, and private and public with regard to the number of the partners. The rules which are particularly applicable to these will be examined successively.

1469. A *universal partnership* is one where the parties agree to bring into the firm all their property, real, personal, and mixed, and to employ all their labor, skill, and services in the trade or business for their common benefit. This kind of partnership, although sanctioned, or at least not forbidden, by the common law, is yet of rare occurrence. There is, probably, no such thing as a universal partnership, if by the term we are to understand that every thing done, bought, or sold is to be deemed on partnership account. Most men own some real or personal estate which they manage exclusively for themselves.⁵⁶ These were not unknown among the civilians.⁵⁷ Pothier instances the community of goods between husband and wife as a partnership of this kind.⁵⁸

1470. *General partnerships* are properly such where the parties carry on their trade and business for their joint benefit and profit, and it is immaterial whether the capital be limited or not, or the contributions of the partners be equal or unequal.⁵⁹ The same application is given to a partnership where the parties are engaged in one branch of trade only.

1471. *Special or limited partnerships* are of two kinds: at common law and limited partnerships or partnership *in commendam*.

1472. Special partnerships at common law are those formed for a particular or special branch of business, as contradistinguished from the general business or employment of the parties, or of one of them. They are sometimes called limited partnerships when they extend to only one transaction or adventure, such as the purchase of a particular parcel of goods and selling them on joint account, or the undertaking of a voyage or adventure to foreign parts on joint

⁵⁵ Story, Partn. § 288.

⁵⁶ United States Bank v. Binney, 5 Mas. C. C. 176, 183.

⁵⁷ Dig. 17, 2, 5; Inst. 3, 26. In Louisiana such universal partnerships are allowed, but property which may accrue to one of the parties, after entering into the partnership, by donation, succession, or legacy, does not become common stock, and any stipulation to that effect, previous to the obtaining of the property aforesaid, is void. La. Civ. Code, art. 2800.

⁵⁸ Pothier, De Société, n. 20.

⁵⁹ Willett v. Chambers, Cowp. 814; 2 Bell. Comm. 621, 5th ed.

account. The natural termination of a partnership for a single dealing or transaction is the completion of the purpose for which it was formed, but this is not effected until every account or debt relating to the partnership has been settled.⁶⁰

1473. Several states of the Union have passed laws to authorize limited partnerships, by which the liabilities of the special partners are limited to the amount of the capital furnished by them. The details of these laws are different in the several states of the Union, and nothing more than a general outline of them can be here given. The principles upon which they are founded are these:

They can be formed only for the transaction of certain kinds of business, banking and insurance being in general excepted. Being only authorized by statute, they can only transact the kinds of business enumerated in the statute.

Each special partner contributes a specific amount of actual cash capital, and is liable only for the amount so contributed.

The partnership must commence and terminate at certain fixed periods, and no sums are to be withdrawn and no profits divided before the termination of the partnership. If any money is withdrawn by the special partner, he is liable to the creditors for such money and interest.

A certificate must be made by the partners, acknowledged before a magistrate, recorded in the registry provided by the statute, and published a certain number of times in some newspaper. This certificate must contain the names of the partners, the name of the firm, designate who are general and who special partners, specify the sums contributed by the special partners, time of commencing and terminating the partnership, and the nature of the business.

The firm name must contain only the names of the general partners,⁶¹ and the business must be managed by the general partners alone.

A special or limited partnership, being an exception to the rules established among partners by the common law, must be clearly proved, it is never presumed; thus, the contribution being limited as to one or more partners, and the management of the affairs of the firm being confided to one of them, do not raise a presumption that there was a limited partnership. But, although all the forms have been pursued according to the requirements of the local statutes, if the special partners violate any of their provisions, as, for example, by acting as general partners, they become liable as general partners.⁶²

1474. In Louisiana there is a kind of partnership called a partnership *in commendam*,⁶³ which is like the French *société en commendite*.⁶⁴ He who makes this contract is called, in respect to those to whom he makes the advance of capital, a *partner in commendam*.⁶⁵ This species of partnership is formed by a contract, by which a person or partnership agrees to furnish to another person or partnership a certain amount either in property or money, to be employed by the person or partnership to whom it is furnished in his or their own name or firm on condition of receiving a share of the profits in the proportion determined by the contract, and of being liable to losses and expenses to the amount furnished, and no more.⁶⁶

1475. Generally, each partner has authority to bind the firm by contracts concerning the business of the partnership, whether such agreements are oral or written, and may do all acts and give all securities incident to such business according to the ordinary usages of business. The *liability of the firm to third*

⁶⁰ *Petrikín v. Collier*, 1 Penn. St. 250. See *Bentley v. White*, 3 B. Monr. Ky. 263.

⁶¹ *Andrews v. Schott*, 10 Penn. St. 47.

⁶² *Bradbury v. Smith*, 21 Me. 117.

⁶³ La. Civ. Code, art. 2796, *et. seq.*

⁶⁴ Code de Comm. art 26, 33; *Sirey*, tom. xii. partie 2, p. 25.

⁶⁵ La. Civ. Code, art. 2811.

⁶⁶ La. Civ. Code, art. 2810.

parties is not affected by any agreement among themselves.⁶⁷ One partner may borrow money on the credit of the firm, and the firm will be held, though he misapplies it.⁶⁸ So a partner may buy or sell or pledge the partnership property.⁶⁹ In some cases it is held that a partner cannot give notes where they are not necessary or usual in the business.⁷⁰ But such cases turn upon circumstances peculiar to the case. One partner may, by admission, revive a debt against the firm which is barred by the statute of limitations.⁷¹

The firm is liable for a fraud on an innocent third person, committed by one partner, in a matter connected with the partnership business.⁷²

1476. In general, partners are liable for the acts of one another on contracts made in the social name. The following are exceptions to this general rule:

The partners generally will not be liable when one of the partners, without the consent of the firm, signs or indorses the name of the firm to a note as surety for a third person, in which the partnership has no interest, and which is not in the usual course of their business.⁷³ When it appears upon the face of the papers that the partnership name has been given as surety for such third person, and not for a partnership debt, the proof of that fact becomes unnecessary; but when it was indorsed in an ordinary manner such proof must be given, unless the fact is established that it was not given for a partnership debt, and the person to whom it was passed knew it; then it does not matter what the form of the instrument may be; it does not bind the partners who did not assent to it.⁷⁴

The partnership will not be bound by the act of one of the partners when he misapplies the funds, securities, or other effects of the partnership, in discharge of the payment of his own private debts, claims, or contracts. In cases of this kind, the creditor dealing with the partner and knowing the circumstances, as he must do, is deemed to act *malâ fide*, and in fraud of the partnership; the transaction by which the funds, securities, and other effects of the partnership have been so obtained will be treated as a nullity.⁷⁵

But if the partner borrows money of an innocent party in the name of the firm, and appropriates it to his own use, the firm will be held.⁷⁶

But this apparent misapplication of the funds or credits of the firm may be shown to have been made with the express or implied consent of the other part-

⁶⁷ *Dow v. Sayward*, 12 N. H. 275; *Hastings v. Hopkinson*, 28 Vt. 108; *Bailey v. Clark*, 6 Pick. Mass. 372.

⁶⁸ *Bascom v. Young*, 7 Mo. 1; *Winship v. Bank of United States*, 5 Pet. 529; *Onondaga Bank v. De Puy*, 17 Wend. N. Y. 47; *Blinn v. Evans*, 24 Ill. 317.

⁶⁹ *Tapley v. Butterfield*, 1 Metc. Mass. 515.

⁷⁰ *Gray v. Ward*, 18 Ill. 32; *Brown v. Byers*, 16 Mees. & W. Exch. 252.

⁷¹ *Gray v. Bowen*, 8 Metc. Mass. 100; *Austin v. Bostwick*, 9 Conn. 496.

⁷² *Locke v. Stearns*, 1 Metc. Mass. 564; *Stockton v. Frey*, 4 Gill, Md. 406.

⁷³ *Lavery v. Burr*, 1 Wend. N. Y. 529; *Catskill Bank v. Still*, 15 Wend. N. Y. 364; *Rolins v. Stevens*, 31 Me. 452; *Sweetser v. French*, 2 Cush. Mass. 309; *Selden v. Bank of Commerce*, 3 Minn. 166.

⁷⁴ *Foot v. Sabin*, 19 Johns. N. Y. 154, 158; *Dobb v. Halsey*, 16 Johns. N. Y. 38. The partnership is held if the other partners authorized or ratified the indorsement. But the burden of proving this is on the holder of the note. *Hamill v. Purvis*, 2 Penn. 177; *Andrews v. Planters' Bank*, 15 Miss. 192; *Darling v. French*, 22 Me. 188. The firm is held where the note is in the hands of a *bona fide* holder for value. *Gano v. Samuel*, 14 Ohio, 592; *Catskill Bank v. Stall*, 15 Wend. N. Y. 364; *State Bank v. Thompson*, 42 N. H. 369.

⁷⁵ *Gow*, Partn. 60, Phila. ed.; *Rogers v. Batchelor*, 12 Pet. 229; *Fall River Bank v. Sturtevant*, 12 Cush. Mass. 372; *Williams v. Gilchrist*, 11 N. H. 535; *Hickman v. Reineking*, 6 Blackf. Ind. 388; *Maddin v. Branch Bank*, 2 Ala. 502; *Gansevoort v. Williams*, 14 Wend. N. Y. 133; *Williams v. Brimhall*, 13 Gray, Mass. 462; *Fletcher v. Anderson*, 11 Iowa, 228; *Sauntry v. Dunlap*, 12 Wisc. 364. And the court will prevent such a disposition of the firm property by injunction. *Stockdale v. Ullery*, 37 Penn. St. 486.

⁷⁶ *Winship v. United States Bank*, 5 Pet. 529; *Haldeman v. Bank of Middletown*, 28 Penn. St. 440; *Rich v. Davis*, 4 Cal. 22; *Collier v. Cross*, 20 Ga. 1.

ners, and in that case the partnership will be bound. The decision depends not on the creditor's knowledge that the security given is partnership property, but on the question whether the other partners have assented to such an appropriation.⁷⁷

The fairness which is required in all contracts requires that a party dealing with a partner in the name of the firm should be free from suspicion or knowledge that the partner so dealing with him is violating the obligations which he owes to his co-partners. In order to bind the partnership, the contract must not only be within the scope of the business of the partnership, but the party with whom it is made must neither know nor suspect that the partner is acting in opposition to the wishes of his co-partners; for when he possesses such knowledge, the contract will not bind the firm, however obligatory it may be upon the individual partner.⁷⁸

The firm is not bound by any contracts made by one partner in matters not connected with the partnership business,⁷⁹ and any person dealing in such matters with one partner cannot hold the others unless he can prove that they authorized it.⁸⁰

When a contract is made by one partner in the name of the firm, in fraud of the other partners, they will be bound to third persons, if dealing with him innocently; but if the party dealing with the fraudulent partner knew or participated in the fraud, the contract of the other partners would be void.⁸¹ For example, if one partner borrows money for his own separate use, and gives the note of the firm for this individual debt without the assent of the firm, and the lender of the money knows what use is to be made of it.⁸²

The firm will not be bound when a partner makes a contract with a third person, although it be for the benefit of the firm, if the credit was given to the individual partner only; as, if money be borrowed by one of the partners in his own name, and it is applied to the use of the firm.⁸³

When a partnership, composed of several persons, is conducted in the name of one of the partners, and the partner also does business in his own name, and contracts a debt, in the absence of all circumstances to show that the credit was given to the firm, the partners will not be bound; in such case the credit is given to the partner in his individual capacity.⁸⁴

It sometimes happens that two different sets of partners carry on business in the same social name, and that one of the partners is a member of both firms. When there is a confusion in this respect, the partners of one firm may in some cases be made responsible for the debts of another. For example, where three persons carried on trade under the firm of King & Company, and two of those persons with another, under the same social name, carried on another partnership, a bill in the name of the firm, which was drawn on account of the one

⁷⁷ *Ridley v. Taylor*, 13 East. 175; *Ex parte Bonbonus*, 8 Ves. Ch. 540; *Rogers v. Batchelor*, 12 Pet. 229.

⁷⁸ *Stainer v. Tyson*, 3 Hill, N. Y. 279; *Pothier, Obl. n. 83*; *Pothier, de Société*, n. 101; *Collyer, Partn.* 262, 2d. ed.

⁷⁹ *Eastman v. Cooper*, 15 Pick. Mass. 276; *Livingston v. Roosevelt*, 4 Johns. N. Y. 251.

⁸⁰ *Ex parte Agace*, 2 Cox, 312; *Mercien v. Mack*, 10 Wend. N. Y. 461; *Foster v. Andrews*, 2 Penn. 160.

⁸¹ *Gow, Partn.* 181; *Collyer, Partn.* 480.

⁸² *Miller v. Munice*, 6 Hill, N. Y. 115. See *Breckenridge v. Shrieve*, 4 Dan. Ky. 375.

⁸³ *Collyer, Partn.* 478; *Emly v. Lye*, 15 East, 7; *Siffkin v. Walker*, 2 Campb. 308; *Graeff v. Hitchman*, 5 Watts, Penn. 454. See *United States v. Astley*, 3 Wash. C. C. 508; *Le Roy v. Johnson*, 2 Pet. 198; *Green v. Tanner*, 8 Metc. Mass. 411; *Holmes v. Burton*, 9 Vt. 252; *Story, Partn.* § 134.

⁸⁴ *United States Bank v. Binney*, 5 Mas. C. C. 176; 5 Pet. 529; *Eldridge v. Binney*, 9 Pick. Mass. 272. See *Mifflin v. Smith*, 17 Serg. & R. Penn. 165; *Mercantile Bank v. Cox*, 38 Me. 500.

partnership, was made the ground of an action of assumpsit against the other. Lord Kenyon was of opinion that this company was liable; that the partner not connected with the company that drew the bill having traded along with the other partners under that firm, persons taking bills under it, though without his knowledge, had a right to look to him for payment.⁸⁵ But it would seem, first, that any act distinctly indicating credit to be given to one of the partnerships will fix the election of the creditor to that company; and, secondly, that making a claim on either of the firms, or when they are insolvent on either of their estates, will have the same effect.

One partner has no implied authority to bind the firm by a sealed instrument.⁸⁶ Such authority could formerly be given only by a special power under seal.⁸⁷ But the firm is bound if one partner executes a deed in the name of the firm in the presence and with the consent of the other partners.⁸⁸ And it is now held in the United States that a partner may be authorized by parol to execute a deed for the firm.⁸⁹

1477. It may be laid down as a general rule that the partnership is liable for torts done in the course of the partnership concerns,⁹⁰ or by one of the partners under color of acting for the firm, and partners will be liable, although the act may not in fact have been assented to by all the partners; thus, for example, if one of the partners should commit a fraud in the course of the partnership business, all the partners will be liable for the injury, although they have not concurred in the fraud. Indeed, the partnership may be held liable for a libel which was uttered by one of the partners in the course of the business of the firm.⁹¹

All the partners are liable for an injury caused by the negligence of one partner, or by a servant of the firm, while transacting the business of the firm.⁹²

1478. But, as a general rule, a tort committed by one partner will not bind the partnership unless it be either authorized or adopted by the firm, or be within the proper scope and business of the partnership.⁹³

1479. Having discussed the principles of law by which partners become liable to third persons, we come naturally, in the next place, to consider the *rights of partners against third persons*. As in treating of the liabilities of partners the subject was divided into two sections, the same plan will be adopted here, by considering their rights against third persons on contracts, and in relation to torts committed against them.

1480. Whenever a contract has been made between the partners and a third person or persons, or by one of the partners in the name of the firm, and such third persons have engaged to perform or do any thing for the benefit of the partnership, it is clear that the partners jointly have a right to enforce its performance, and they may, indeed must, all join as plaintiffs when recourse is had to law to enforce such right by action. But to this general rule there are several exceptions:

When one of the partners who makes the claim against the third persons is

⁸⁵ *Baker v. Charlton*, Peake, 80; *McNair v. Fleming*, Montagu, Partn. 32 n. (r); *Phillips v. Paxton*, 3 Mart. n. s. La. 39; 7 East, 210; 2 Bell, Comm. 670, 5th ed.

⁸⁶ *Cady v. Shepherd*, 11 Pick. Mass. 400; *Cummins v. Cassily*, 5 B. Monr. Ky. 75.

⁸⁷ *Van Deusen v. Blum*, 18 Pick. Mass. 231.

⁸⁸ *Anthony v. Butler*, 13 Pet. 423; *Halsey v. Whitney*, 4 Mas. C. C. 232; *Pike v. Bacon*, 21 Me. 280.

⁸⁹ *Cady v. Shepherd*, 11 Pick. Mass. 400; *Fox v. Norton*, 9 Mich. 207.

⁹⁰ *Holbrook v. Wright*, 24 Wend. N. Y. 169; *Nesbit v. Patten*, 4 Rawle, Penn. 120; *Story*, Partn. § 166.

⁹¹ *Rex v. Almon*, 5 Burr. 2686.

⁹² *Linton v. Hurley*, 14 Gray, Mass. 191.

⁹³ *Taylor v. Jones*, 42 N. H. 25.

liable as a partner of another firm, so that if a suit were brought, he must be both plaintiff and defendant; as, where A, B, and C are partners, trading under the name of A, B, and C, have a claim against D, E and C, trading under the name of D, E & Company, it is evident here that C, being a partner in both firms, must be made plaintiff and defendant.⁹⁴ In this case it is clear the creditors having no remedy at law must have recourse to equity, where, all parties in interest must join and be joined in the suit, even when the controversy is between two firms, in each of which some one or more of them are partners.⁹⁵

A second exception may arise in consequence of the incompetency of one of the partners to maintain a suit from his peculiar national character, or other circumstance. Thus the rights of a partnership are suspended during a state of war with the United States, when one of the partners is domiciled in an enemy's country, or is a subject or citizen of such belligerent state, and claiming in this country; the reason of this is that a state of war suspends all commercial intercourse between the belligerents, and shuts their courts against all suits and proceedings, and all claims of persons who have obtained or retain a hostile character.⁹⁶ This right, however, is only suspended, for on the return of peace, or when the alien enemy loses that character, his rights return, and with them those of the partnership.

1481. To entitle the partnership to a right against third persons, the contract must have been made in the name of the firm making the claim, or, at least, for the benefit of the partnership. It is clear that when the contract is made in the name of the firm, the partners have a joint right against the person or persons who have agreed to perform something or to pay a sum of money to the firm.

We have seen that when a partner makes a contract in his own name only the obligations on his part are limited to himself, and he alone is entitled to all the advantages to be derived from it; but to this rule there is an exception. When the contract is made by one partner in his own name, for and on behalf of the partnership or for its benefit, the firm will be bound by it; and so on the other side, if the benefit is intended for the firm, it will be entitled to all the advantages to be derived from it; if, for example, a contract of guaranty should be entered into apparently with one partner, but in reality it should be intended for the indemnity of the firm for advances to be made by the partnership, an action might be maintained by all the partners, as upon a joint contract with the partnership, although the written papers containing the guaranty should be addressed to one of the partners, and he alone should conduct the negotiation;⁹⁷ but in such case it must appear that the contract, although made by one partner, was for the benefit of the firm.⁹⁸

1482. When new partners are admitted and old ones go out of a firm, and the name of the firm is not changed, and as usual the property and securities of the existing partnership remain and become a part of the funds of the new firm, though the latter are entitled in equity, they have no right at law, which they can enforce, on the contracts of the old firm, and if suits are to be brought

⁹⁴ *Bosanquet v. Wray*, 6 Taunt. 597. See *Jacaud v. French*, 12 East, 317; *Sparrow v. Chisman*, 9 Barnew. & C. 241; *Bailey v. Banker*, 3 Hill, N. Y. 188; *Denny v. Metcalf*, 28 Me. 389; *Rogers v. Rogers*, 5 Ired. Eq. No. C. 31; *Burley v. Harris*, 8 N. H. 235; *Graham v. Harris*, 5 Gill & J. Md. 487; *Belknap v. Gibbens*, 13 Metc. Mass. 471.

⁹⁵ *Story*, Eq. Jur. § 666 *et seq.*

⁹⁶ *The Julia*, 8 Cranch, 181; *Griswold v. Waddington*, 16 Johns. N. Y. 438.

⁹⁷ *Garrett v. Handley*, 4 Barnew. & C. 664. See *Alexander v. Barker*, 2 Crompt. & J. Exch. 133.

⁹⁸ *Garrett v. Handley*, 3 Barnew. & C. 462.

to recover on such contracts, they must be in the names of the partners of the old firm.⁹⁹

1483. Sometimes contracts entered into with a firm are of a continuing nature, and enure to the benefit of new partners, but this must clearly appear from the contract to have been the intention of the parties. Thus when a guaranty is made or given for advances, on credits to be given at a future time by a particular firm, and afterward the firm is changed, either by admitting a new partner or by one of the old ones retiring, as above mentioned, the name remaining the same, and on the faith of this guaranty, advances are afterward made, it has been held that the guarantor was not responsible, because his contract was not with the members of the new firm.¹⁰⁰

1484. When the partners have sustained an injury in consequence of any tort committed by strangers to their property or rights as such, and they have suffered joint damages, they have a right to redress for the wrong. If, therefore, a slander of the firm or a libel has been published, and the partners have received a joint injury, they may maintain a joint action against the slanderer, and may recover such damages as the firm has sustained for the joint tort; but in such case the damages must be strictly limited to the injury to the partnership, in their joint trade or business, and no damages can be recovered for the injury to the feelings of the individual partners.¹⁰¹ And the firm may well receive a joint injury by a libel affecting the mercantile standing of only one partner.

They are likewise entitled to an action against third persons for any other injury to the partnership property when the injuries are to their rights as partners.

1485. The subject of *the dissolution of the partnership* will be considered by taking a view of the means by which it takes place; the effect of the dissolution.

1486. This is done by the acts of the parties; the operation of law; by the decree of a court of equity, or the award of arbitrators. These will be separately examined.

1487. It is clear that the parties who have formed a partnership have a right to alter or change their contract in any manner they please when they are all united, whether the contract of partnership be for a limited or an unlimited period.

When the partnership has been created for a definite period, and the same power which gave it birth limited its duration, the moment when its existence is to cease arrives it has no longer any life. It ends as a matter of law and of right by the mere efflux of time. But it frequently happens that it is prolonged by the acts of the parties, either express or implied. When the act is an express one, the partnership acquires a new existence upon the terms and conditions which the partners please to give it, as they did in the original contract. When, on the contrary, the partnership is continued by the implied conduct of the parties, it is not always easy to determine what their acts intended. These depend upon the situation of the parties, and upon circumstances which may qualify or explain them. In the absence of all such controlling circumstances, when the business is carried on after the time has expired during which the partnership was limited, it will be considered as renewed upon the same terms, as to the interests and rights of the partners, as they had under the original agreement, but the new partnership will be treated

⁹⁹ Collyer, Partn. 649; McGregor v. Cleveland, 5 Wend. N. Y. 475.

¹⁰⁰ Collyer, Partn.; Cremer v. Higginson, 1 Mas. C. C. 323.

¹⁰¹ Haythorne v. Lawson, 3 Carr. & P. 196.

as a mere partnership to continue during the will and pleasure of the parties, and it may, therefore, be dissolved by any one of them whenever he may deem proper to do so.¹⁰²

1488. A question may arise whether, when the time of duration of the partnership is fixed, either partner has a right to withdraw from the firm, and by that means dissolve the partnership, becoming subject to the other partners to an action for the breach of his agreement to continue the partnership. The better opinion seems to be that no such right exists, though judgments and opinions have been given both ways.¹⁰³

1489. The partnership may be limited to expire upon the happening of an uncertain event, and not before. In this case it requires the concurrent act of all the partners to dissolve it until the event has happened; and on the happening of the event, it is dissolved as a matter of course, unless continued by the consent of all the parties to it; for example, if two persons, otherwise unconnected in business, should join in an enterprise, voyage, or other adventure, for their joint account and mutual profit, as by hiring a ship for a particular voyage, and the ship should have performed the voyage, the whole of the business agreed to be done by the partnership having been accomplished, the social contract would be at an end by the mere occurrence of the event and the lapse of time.¹⁰⁴ But a distinction must be observed between the completion of the affair undertaken, by which the social contract is to end, and modifications and changes which may be made in it; thus, if a firm contracted to execute a public work according to a known plan, and that the partnership should continue till it should be completed, it would not be dissolved by the simple circumstance that the government had changed the plan, a right which had been reserved, if the partners have continued the work, which is of the same kind.¹⁰⁵

1490. In those cases where there are no certain limits to the duration of the partnership, it is deemed to be a mere partnership at will, and therefore dissoluble at any time by the act of either or of all the partners.¹⁰⁶

1491. A partnership is dissolved by operation of law upon various grounds, which will be separately considered.

1492. When a partnership is formed, the parties to it must be *sui juris*, and the presumption is that they will continue so; the social contract, then, is made upon that implied condition. The dissolution of the partnership must, therefore, take place whenever one of the partners becomes incapable of acting *sui juris*. This is the case whenever a partner is put under actual tutelage or

¹⁰² *United States Bank v. Binney*, 5 Mas. C. C. 176; *Mifflin v. Smith*, 17 Serg. & R. Penn. 165; *Featherstonhaugh v. Fenwick*, 17 Ves. Ch. 299.

¹⁰³ See *Story*, Partn. § 275; 3 Kent, Comm. 4th ed. 54, 55, 61; *Story*, Eq. Jur. § 668. The cases favorable to the right of one partner to dissolve the partnership by his own act before the expiration of the limited time are *Marquand v. New York M. Co.* 17 Johns. N. Y. 525; *Bishop v. Breckles*, 1 Hoffm. Ch. N. Y. 534; *Monroe v. Conner*, 15 Me. 180; and the dictum of Mr. Justice Platt, in *Skinner v. Dayton*, 19 Johns. N. Y. 538. The cases against the right are *Pierpont v. Graham*, 4 Wash. C. C. 234; *Peacock v. Peacock*, 16 Ves. Ch. 56; *Crawshay v. Maule*, 1 Swanst. Ch. 495; *Bishop v. Breckles*, 1 Hoffm. Ch. N. Y. 534; *Howell v. Harvey*, 5 Ark. 281.

¹⁰⁴ *Gow*, Partn. c. 5, s. 1; *Story*, Partn. § 280.

¹⁰⁶ *Pardessus*, Dr. Com. n. 1053.

¹⁰⁵ *Marquand v. New York Mfg. Co.*, 17 Johns. N. Y. 525. By the Roman and the French law the partner is not allowed to dissolve the partnership at an unseasonable time, when the dissolution would be particularly injurious to the other partners. *Pothier*, de Société, n. 149; *Code Civil*, art. 1869, 1870, 1871. The same rules have been substantially adopted in Scotland. 2 Bell, Comm. 532, 533, 5th ed.; *Erskine*, Inst. B. 3, c. 3, § 26. And in the state of Louisiana. *La. Civil Code*, art. 2855-2859. There does not appear to be any direct authority in the English law as to whether a partner will or will not be restrained from breaking up such partnership in consequence of its being unseasonable. *Crawshay v. Maule*, 1 Swanst. Ch. 509 to 514, note.

guardianship by reason of idiocy, insanity, or because of any excessive weakness or vice, such as drunkenness.¹⁰⁷

1493. Upon the same principle, probably, a dissolution would take place where one of the partners was convicted of a felony and confined in a penitentiary, for, in that case, he would not fulfil the duties incumbent upon him as a partner any more than if he had been insane. Besides, it would be unjust to subject an honest and an honorable man to continue an association with a felon.¹⁰⁸ But in these cases the contract would not be dissolved by the simple fact of the conviction, but would be good ground to apply to a court of equity to dissolve the social compact.

1494. The marriage of a female partner would, for the like reason, cause a dissolution of the partnership by operation of law for two reasons: first, by the marriage at common law the whole of the personal property of the wife becomes vested in the husband in his own right,¹⁰⁹ unless there is some valid contract to the contrary; secondly, the marriage makes her incapable to enter into any valid contract.¹¹⁰

1495. Though a partner cannot by his own act withdraw from a partnership until the time limited for its duration has expired, yet if he make a *bona fide* voluntary sale of all his right, title, and interest in the partnership property and effects, that will at once dissolve the partnership and convert the assignee or purchaser into a tenant in common with the other partners; for no man can force his co-partners to accept the purchaser as a member of the firm which he has just left.¹¹¹ If such consent be given, then the old partnership is dissolved and a new one is formed.

Such a general assignment by one of the partners will have the effect of dissolving the partnership when the duration was unlimited, for the act of making it will be an election to dissolve, which he had a right to do.¹¹²

But in some cases the assignment is involuntary, *in invitum*, under judicial process. The share of a partner in the partnership property may be seized and sold for the separate debt of the partner; when the execution is levied upon the whole of the tangible goods, or upon a part of them, and a sale of the right, title, and property of them takes place, the purchaser becomes entitled to the judgment debtor's right, title, and interest in the same, as it shall appear upon

¹⁰⁷ Watson, Partn. 382; Gow, Partn. 269.

¹⁰⁸ Duvergier, in his *Droit Civil Français*, tome 5, n. 450, says: "'La confiance personnelle, à dit M. Trielhard, est la base du contrat de société.' M. Locré, tome xiv., n. 524. Si donc la conduit d'un associé est telle que cette confiance ne puisse plus exister dans l'esprit de ses co-associés; si, par exemple, il commet des fautes multipliées; à plus forte raison s'il se rend coupable de malversations, on a droit de demander contre lui la dissolution. Il avait virtuellement promis d'être habile et honnête; il manque à son obligation, ses co-associés sont dégagés. Ce n'est pas seulement d'après leurs relations entre eux qu'il convient d'apprécier la moralité des associés; des actes étrangers aux affaires sociales, qui seraient de nature à enlever à l'un d'eux la considération dont il jouissait au moment de la formation de la société, pourraient justifier une demande en dissolution. Qui voudrait condamner des hommes d'honneur au supplice d'un contact perpétuel avec un homme justement flétri par des condamnations judiciaires, ou par l'opinion publique! La gravité des faits, la nature et la fréquence des rapports qu'exige le caractère particulier de la société, seront pesés par les magistrats; et s'ils jugent que le lien social est devenu insupportable par la faute de l'un de ceux qui l'ont formé, ils le rompront."

¹⁰⁹ In some states a provision is made by statute that the personal property of the wife shall remain hers.

¹¹⁰ Nerot v. Burnard, 4 Russ. Ch. 247.

¹¹¹ Marquand v. New York Mfg. Co., 17 Johns. N. Y. 525; Rodrigues v. Heffernan, 5 Johns. Ch. N. Y. 417; Nicoll v. Mumford, 4 Johns. Ch. N. Y. 522; Cochran v. Perry, 8 Watts & S. Penn. 262; Whitton v. Smith, 1 Freem. Miss. 231; Simmons v. Curtis, 41 Me. 873; Harrison v. Sterry, 5 Cranch, 300.

¹¹² Marquand v. New York Mfg. Co., 17 Johns. N. Y. 525, 529.

a final settlement and adjustment of the partnership concerns.¹¹³ By operation of law, on the completion of the levy and sale the purchaser becomes a tenant in common with the other partners, and the partnership is thereby dissolved.

1496. The bankruptcy of the whole of the partners will of course dissolve the partnership, for the whole of the property of the firm passes to the assignees for distribution among the creditors.¹¹⁴ When only one of the partners becomes bankrupt, his interest in the partnership property passes to his assignees, and this has the same effect of destroying the partnership, the assignee being a tenant in common with the solvent partners and entitled to the bankrupt's share upon a final settlement of the social concerns.¹¹⁵

The insolvency of all or of one of the partners and an assignment under the insolvent laws will have the same effect, for the property passes to assignees for the benefit of creditors.

1497. A state of public war between two countries causes a suspension of all commercial intercourse; the courts are closed against the enemy; the property of alien enemies is liable to capture and confiscation, and no communication of an amicable nature can exist between the citizens or subjects of two countries thus at war. This will of itself dissolve a partnership existing at the time of the declaration of war, when some of the partners are the citizens of one and the others are citizens or subjects of the other country. And as the domicile, and not the natural allegiance of the partners, makes them enemies or not, it follows that when some of the partners are residents in the enemy's country they will be considered enemies, and their share of the partnership property is liable to capture and condemnation, although the partnership establishment is in a neutral country.¹¹⁶ And when the partnership is established in the enemy's country, it is treated throughout as hostile, and the whole of the partnership property is liable to be considered as the enemy's property, although some of the partners may be domiciled in a neutral country.¹¹⁷ When in these cases there is an utter incompatibility created by operation of law between the partners as to their respective rights, duties, liabilities, and obligations, both public and private, a dissolution must necessarily result from it, whether the parties consent to it or not; the dissolution is created by operation of law.¹¹⁸

1498. The object which the several persons who enter into partnership have in view when they form the social contract is to promote their several fortunes by the aid and assistance of their fellows. One partner may possess qualifications for one branch of the proposed business, and another may understand some other branch of it. By uniting their skill and knowledge they may promote each other's interest and welfare. As the end of the partnership is destroyed by the death of one or more of the partners, it follows that the partnership is dissolved by such an event. But independently of the personal advantage which the deceased partner might be to the firm in a pecuniary point of view, there is another valid reason why the partnership should end with his death. A man may be willing to be the partner with one man without having any reason but his choice, and be unwilling to be the partner of another; if the partnership should be continued, it must of course be with the representatives of the deceased, and these might be the foes of the surviving partner.

¹¹³ *Nixon v. Nash*, 12 Ohio St. 647. Where an execution against one partner is levied on land belonging to the firm, the creditor merely acquires a right to an account and division. *Clagett v. Kilbourne*, 1 Black, 346.

¹¹⁴ *Arnold v. Brown*, 24 Pick. Mass. 93; *Siegel v. Chidsey*, 28 Penn. St. 279.

¹¹⁵ *Story*, Partn. § 311.

¹¹⁶ *The Franklin*, 6 C. Rob. Adm. 127.

¹¹⁷ *The Friendschaft*, 4 Wheat. 105; *The San Jose Indiano*, 2 Gall. C. C. 268; *The Vigilantia*, 1 C. Rob. Adm. 1.

¹¹⁸ *Griswold v. Waddington*, 15 Johns. N. Y. 57; 16 Johns. N. Y. 438.

These principles are so consonant with reason that perhaps in all the modern codes they have as much force as they have in the common law.¹¹⁹

1499. Though death doubtless dissolves the partnership, it has been questioned at what time it operates the destruction of the firm, whether from the moment it takes place or from the time it becomes known to the other partners. The dissolution takes place from the time of the death, whether such death be known or unknown, not only with regard to the partners themselves, but in relation to third persons.¹²⁰

The reasons above advanced to show that a partnership must be considered dissolved by the death of one or more partners apply only in cases where the parties have not otherwise provided; for the parties may make a partnership which shall exist notwithstanding the death of one of the partners; and the whole or only a part of the assets of the deceased may be made liable for the debts contracted after the death.¹²¹ And a testator may also make his assets liable for the whole of the partnership debts which may accrue, and provide for the continuation of the partnership by his last will and testament.¹²²

1500. The extinction and absolute loss of all the things which form the common stock of a partnership have the effect of dissolving it. For example: if two merchants, not otherwise partners, should buy a ship, to be employed on joint account, and the ship should be lost, the partnership will be at an end.¹²³ Again, suppose that a partnership should be formed for the purpose of buying the whole of a patent right to a new invention, and for selling such right to certain districts; and in consequence of some negligence in not fulfilling the requirements of the law, or if the law granting such right should be repealed, the right should be lost, there would be nothing for the partnership to operate upon, there would no longer be any community, and therefore the partnership would be dissolved.

But when only a part of the partnership stock has been lost, the effect will not be the same in every case. A distinction must be made between cases where the property furnished by the partners is partially lost, and where the part which one was to furnish is wholly lost. In the first case, the partnership shall be continued with the remainder of the stock; as, where one merchant had put into the common fund one ship, the *George Washington*, and the other another, the *Napoleon*, and after they became the joint property the *Napoleon* was lost; the partnership would not, on this account, be dissolved, and the business of the firm would be carried on with the other ship. But if, on the contrary, the partners were each to furnish only the use of a thing, and that thing should be lost, the partnership would necessarily be dissolved. For example: if two persons, each owning a ship, should agree to form a partnership of the profits which should arise from the trade of the two ships between New York and Liverpool, and one of the ships should be lost, the partnership would be dissolved, and the owner of the lost ship would be entitled to the profits only up to the time when his ship was cast away. Again, suppose that Peter and Paul have entered into partnership, and by their agreement, Peter is to furnish canvas on which Paul is to paint pictures, and Peter engages to sell

¹¹⁹ Inst. 3, 26, 5; Dig. 17, 2, 65, 9; Pothier, de Société, n. 144; *Burwell v. Mandeville*, 2 How. 560; *Knapp v. McBride*, 7 Ala. n. s. 19; *Murray v. Mumford*, 6 Cow. N. Y. 441; *Canfield v. Hard*, 6 Conn. 184; *Ames v. Downing*, 1 Bradf. Surr. N. Y. 321.

¹²⁰ *Vulliamy v. Noble*, 3 Mer. Ch. 593; 2 Bell, Comm. 5th ed. 639. *Caldwell v. Stileman*, 1 Rawle, Penn. 212; *Story, Partn.* § 317; *Scholefield v. Eichelberger*, 7 Pet. 586; *Dyer v. Clark*, 5 Metc. Mass. 575.

¹²¹ *Knapp v. McBride*, 7 Ala. n. s. 19; *Gratz v. Bayard*, 11 Serg. & R. Penn. 41.

¹²² *Burwell v. Mandeville's Executors*, 2 How. 560.

¹²³ 4 Pardessus, Dr. Com. § 1054; *Story, Partn.* § 280; *Mumford v. McKay*, 8 Wend. N. Y. 442; *Griswold v. Waddington*, 16 Johns. N. Y. 491.

them on joint account; now if Paul, whose work was to be put upon the canvas, should become paralyzed, so as to be totally disabled to fulfill his contract, the partnership would be at an end.¹²⁴

This cause of dissolving the partnership, by the loss of the property which is the subject of it, may also be ranked among the cases in which the social compact is dissolved by the consent of the parties, for it is fair to presume that such was their intention.

1501. The courts of common law have no jurisdiction to decree a dissolution of a partnership for any cause whatever. A submission and award may have the effect of dissolving a partnership. When the submission refers, by the express terms it contains, the question whether a partnership shall or shall not be dissolved, and an award directly awarding the dissolution is made, it will, if it be unimpeached and unimpeachable, *ipso facto* amount to a positive dissolution.¹²⁵

Courts of equity, or those possessing equitable powers, may, for just cause, decree a dissolution of the partnership, and declare it void *ab initio*, or only from the time of the decree.

1502. The causes for which a partnership will be dissolved *ab initio* must have arisen before the formation of the partnership, for if there was no unfairness at that time, the partnership was properly formed, and it cannot therefore be dissolved by a court of equity for any other than causes which have since occurred. The grounds upon which a partnership will be so dissolved are fraud, imposition, misrepresentation, or oppression in the original agreement for the partnership.¹²⁶

1503. The causes which arise after the formation of the partnership for which a dissolution will be decreed are naturally divided into those founded on the alleged misconduct, or fraud, or violation of duty of a partner; and those where no blame is attached to either partner.

1504. As to the nature of the misconduct for which a dissolution will be decreed, it is to be observed that every trivial departure from duty, or unimportant violation of the articles of partnership, or trifling fault, will not be sufficient to found a decree upon; as, where a partner exhibits a moroseness of temper, or occasionally disputes with the other, or does any other similar act which does not essentially obstruct or destroy the pecuniary rights, or interests, or operations of the partnership; for, although these may be inconvenient grievances, a court of equity has no jurisdiction to prevent them.¹²⁷

1505. Whenever the conduct of one partner is such as materially to affect the pecuniary rights of the others, such as gross misconduct or abuse of authority, or gross want of good faith or diligence, which render it impracticable to carry on the business with advantage, or which would be positively ruinous to the interests of the partnership, a court of equity will interfere and decree a dissolution.¹²⁸ But to support such proceedings a clear case of abuse, or of imminent and threatened danger, must be fully made out. When the danger is only prospective, instead of dissolving the partnership the court will, when

¹²⁴ Pothier, Du Contrat de Société, n. 142. See Pardessus, Dr. Com. partie 5, tit. 3, ch. 1, s. 3.

¹²⁵ Watson, Partn. ch. 7; Gow, Partn. ch. 5, s. 1.

¹²⁶ Story, Eq. Jur. § 222, 240.

¹²⁷ Goodman v. Whitcomb, 1 Jac. & W. Ch. 592. But the court will decree a dissolution where there is a violent and lasting dissension between the partners which entirely prevents the proper management of the business. Blake v. Dorgan, 1 Iowa, 537.

¹²⁸ Story, Eq. Jur. § 673; Collyer, Partn. § 297; Gratz v. Bayard, 11 Serg. & R. Penn. 41; 1 Mont. on Partn. part 3, c. 1; Gow, Partn. c. 5, § 1; Watson, Partn. 381; Howell v. Harvey, 5 Ark. 278; Durbin v. Barber, 14 Ohio, 315.

a proper case is made out, grant an injunction to prevent the threatened injury.¹²⁹

There may be many circumstances of a less grave nature which will justify a court of equity in dissolving a partnership; as, the long absence of a partner abroad for his mere pleasure, or for the purpose of attending to his own separate affairs, to the neglect or detriment of the business of the partnership; or his voluntary engagement in pursuits which are injurious to the social affairs; or changing his domicile, voluntarily, to another country; and many similar acts.¹³⁰

1508. The cases for which a dissolution will be decreed by a court of equity, when neither party is to blame, may be classed principally into those where the business to be carried on is impracticable, one of the partners becomes unable to fulfil his part of the contract, the partner becomes insane, the happening of an event on which the existence of the partnership was to cease.

1507. When there is a total impracticability of carrying on the business for which the partnership was formed, and the further continuance might prove highly detrimental or ruinous to some of the partners, a court of equity will decree a dissolution; as, where the partners had undertaken to work a mine, which turns out to be wholly unproductive, or where it becomes so filled with water that it cannot be dried without great loss and ruin; or where the parties have associated for the purpose of introducing a new invention which turns out to be worthless.¹³¹

1508. In the second place, a partnership may be judicially dissolved on account of the incapacity of one partner to perform his obligations and duties, and to contribute the skill, labor, and diligence toward the promotion and accomplishment of the objects for which the partnership was formed, which he had engaged to perform; as in the case already mentioned of a partner who engaged, on his part, to paint pictures, and where the other agreed to furnish the canvas and sell the pictures on joint account, and the painter became paralyzed. It must be observed, however, that every inability will not be a ground for dissolution, and these cases are of infinite delicacy. There is no standard by which it can be ascertained how long a term of inability may justify measures of this description. A broken leg, or an accidental blow, may incapacitate a partner for a time as much as a permanent disease. Much must depend upon the circumstances of each case, and no general rule can be laid down. But when the agreement is not that the partner shall himself personally perform the work or contribute his skill to the business of the partnership, but such work may be performed by another in his place, he may justly oppose the dissolution of the partnership by finding a competent substitute at his own expense.¹³²

1509. For a similar reason, the insanity of a partner, by which he has become permanently incapable of fulfilling his obligations toward his associates, may be a ground of dissolution. When the partner has been found a lunatic by a regular inquisition, there can be but little doubt that it is sufficient ground for a dissolution, and perhaps the fact that a committee or guardian has been appointed for him is itself a dissolution, for then he has no right in the business of the firm, which he cannot himself exercise; still some authorities seem

¹²⁹ *Eden*, Inj. 359; *Story*, Partn. § 224, 287, 288; *Charlton v. Poulter*, 19 Ves. Ch. 148, note (c); *Gratz v. Bayard*, 11 Serg. & R. Penn. 41.

¹³⁰ See *Whiteman v. Leonard*, 3 Pick. Mass. 177; *Arnold v. Brown*, 24 Pick. Mass. 89.

¹³¹ 3 Kent, Comm. 4th ed. 60; *Gow*, Partn. ch. 5, s. 1, 3d ed.; 2 Bell, Comm. 633, note (2), 5th ed.; *Collyer*, Partn. book 2, c. 3, s. 3; *Griswold v. Waddington*, 16 Johns. N. Y. 491; *Howell v. Harvey*, 5 Ark. 278.

¹³² See *Pothier*, n. 142; *Duvergier*, Dr. Civ. Fr., tome 5, n. 448.

to justify the idea that to make a complete dissolution on the ground of insanity the other partners must go into equity.¹³³ But although on principle, it might perhaps be contended that the partnership is dissolved by the fact of his insanity,¹³⁴ yet it appears to be well settled that before inquisition found, insanity does not, *per se*, amount to a dissolution of the partnership, and to accomplish that object the aid of a court of equity must be invoked.¹³⁵ And before a decree dissolving the partnership will be made, proof of permanent insanity, of a nature to disqualify the partner to perform the obligations which he owes to the firm, will be required; for if the malady is merely temporary, or there is a prospect that it will be cured, the partnership will not be dissolved.¹³⁶

1510. The happening of an event on which by the social compact the partnership was to end; as, where a resolatory condition was foreseen by the contract; this would doubtless be a sufficient ground for a court of equity to interfere.

Thus, for instance, if two should hire a ship for a voyage on their common account, the partnership would end when the accounts of the voyage were settled.¹³⁷

1511. The dissolution affects the rights of creditors and those of the partners; these will be considered separately in two articles.

1512. In considering the question as to how the dissolution affects creditors it will be convenient to examine, first, who are creditors, and, second, what assets will be liable for the payment of their debts.

1513. In whatever manner the dissolution has taken place, whether by the acts of the parties, the operation of law, the award of arbitrators, or the decree of a court of equity, the rights of persons who were creditors at the time of the dissolution of the partnership are in no wise affected, changed, or varied by that act.¹³⁸ Further, the dissolution does not relieve the partners from their liabilities to third persons for any contract which may be made by one of the partners in the name of the firm, unless notice, actual or constructive, has been given to such persons that the partnership has been dissolved; for, when a partnership has once been formed, it is considered as continuing, as to third persons, until notice of its dissolution.¹³⁹

1514. When notice of the dissolution is required in order to exonerate the partners from further liability, its publication is sufficient with regard to all persons who have not had dealings with the firm, when it is made in some newspaper of general circulation;¹⁴⁰ but when persons have dealt with the

¹³³ Story, Partn. § 295, note 1. See contra, *Isler v. Baker*, 6 Humphr. Tenn. 85; *Davis v. Lane*, 10 N. H. 161.

¹³⁴ The argument in favor of the theory that a partnership is dissolved by the act of insanity itself is, that the partners when acting individually in the transaction of the business act as the agents of the other partners, and as a crazy man cannot have an agent, this presumption of having given authority is rebutted by the fact that the man is incapable of appointing one. Would a deed of sale, it has been asked, by a person manifestly insane at the time be valid? If not, can that of his agent be in a better condition?

¹³⁵ *Sayer v. Bennett*, 1 Cox, Ch. 107, 109; *Walters v. Taylor*, 2 Ves. & B. Ch. Ir. 299; *Jones v. Noy*, 2 Mylne & K. Ch. 125; 3 Kent, Com. 58; *Griswold v. Waddington*, 15 Johns. N. Y. 57.

¹³⁶ *Jones v. Noy*, 2 Mylne & K. Ch. 125; *Gow*, Partn. c. 5, s. 1.

¹³⁷ *Griswold v. Waddington*, 16 Johns. N. Y. 491.

¹³⁸ *Forrest v. Waln*, 4 Yeates, Penn. 337.

¹³⁹ *Thurston v. Perkins*, 7 Mo. 29; *Princeton and Kingston Turnpike Co. v. Gulick*, 1 Harr. Del. 161; *Tombeckbee Bank v. Dumell*, 5 Mas. C. C. 57; *Sanderson v. Milton Stage Co.*, 18 Vt. 107.

¹⁴⁰ *Shurlds v. Tilson*, 2 McLean, C. C. 458; *Mauldin v. Branch Bank*, 2 Ala. n. s. 502; *Gallcott v. Planters' & Mechanics' Bank*, 1 McMull. So. C. 209; *Lansing v. Gaines*, 2 Johns. N. Y. 300; *Graves v. Merry*, 6 Cow. N. Y. 701; *Ketcham v. Clark*, 6 Johns. N. Y. 144; *Pren-tiss v. Sinclair*, 5 Vt. 149.

firm, actual notice of the dissolution will in general be required, and a newspaper notice will not be sufficient,¹⁴¹ unless brought home to the party.

There are some cases where a notice of the dissolution of the partnership is not requisite; these are, where the dissolution takes place in consequence of the death of a partner, where it happens by the bankruptcy of one of the associates, and in case of the retirement of a dormant partner.

In the cases of death and bankruptcy no notice is necessary, because the partnership is dissolved by operation of law. A dead man cannot be bound by any contract whatever, nor his estate affected by any engagement made by the surviving partners; and in case of bankruptcy, the notoriety of the proceedings being matter of record is equal to a notice.

With regard to a dormant partner, no notice is required to shelter him from liability for any debts or contracts of the firm after he has retired. His liability began *de jure* when he went into the firm; and no credit was in fact given to such partner after the dissolution, for it was unknown that he was a member of the firm at the time the credit was given. He became liable by operation of law, independent of his intention, in consequence of participating in the profits of the concern, and as soon as such participation ceased by his retirement, by operation of law his liability ceased also, whether notice were given or not.¹⁴² But such a partner will not be considered as dormant with regard to persons who knew him to be a partner, and as to them, he will be liable unless notice be given.¹⁴³

1515. The dissolution will not absolve the partners from liabilities to third persons for any contract that any partner may have made afterward in the name of the firm, unless it appears,

That the creditor had due notice of the dissolution;¹⁴⁴ or,

That he had no transaction with the firm until after the dissolution;¹⁴⁵ or,

That the partnership was not general, but limited to a particular purchase, adventure, contract, or voyage, and it was terminated before the debt was created; or,

That the new transaction was not within the scope of the original business of the partnership; or,

That it is illegal, fraudulent, or void; or,

That the person sought to be charged had been a dormant partner to whom no credit was actually given, and who had retired before the transaction took place.

1516. After a *bona fide* dissolution one partner cannot renew the partnership notes, for this is essentially making a new contract;¹⁴⁶ and if authorized to settle the accounts, he cannot give the firm note in payment.¹⁴⁷

¹⁴¹ *Williamson v. Bank of Pennsylvania*, 4 Whart. Penn. 482; *Prentiss v. Sinclair*, 5 Vt. 149; *Wardwell v. Haight*, 2 Barb. N. Y. 549; *White v. Murphy*, 3 Rich. So. C. 369; *Johnson v. Totten*, 3 Cal. 343; *Page v. Brant*, 18 Ill. 37; *Goddard v. Pratt*, 16 Pick. Mass. 431; *Boyd v. McCann*, 10 Md. 118; *Lyon v. Johnson*, 28 Conn. 1; *Little v. Clarke*, 36 Penn. St. 114.

¹⁴² *Grosvenor v. Lloyd*, 1 Metc. Mass. 20; *Kelley v. Hurlburt*, 5 Cow. N. Y. 536; *Deford v. Reynolds*, 36 Penn. St. 325.

¹⁴³ *Story*, Partn. § 159; *Evans v. Drummond*, 4 Esp. 80; *Newmarch v. Clay*, 14 East, 239; *Magill v. Merrie*, 5 B. Monr. Ky. 168; *Grosvenor v. Lloyd*, 1 Metc. Mass. 19; *Davis v. Allen*, 3 N. Y. 168; *Park v. Wooten*, 35 Ala. N. S. 242.

¹⁴⁴ *Pitcher v. Barrows*, 17 Pick. Mass. 365; *Thommon v. Kalback*, 12 Serg. & R. Penn. 238; *Williams v. Bowers*, 15 Cal. 321.

¹⁴⁵ *Chamberlain v. Dow*, 10 Mich. 319.

¹⁴⁶ *Bank of S. Carolina v. Humphreys*, 1 M'Cord, So. C. 388; *Bowman v. Blodgett*, 2 Metc. Mass. 309; *Martin v. Kirk*, 2 Humphr. Tenn. 529; *Stone v. Chamberlain*, 20 Ga. 259. *Contra*, *Dundas v. Gallagher*, 4 Penn. St. 242.

¹⁴⁷ *Perrin v. Keene*, 19 Me. 355; *Chase v. Kendall*, 6 Ind. 304; *Palmer v. Dodge*, 4 Ohio St. 21.

1517. The same observation may be made with regard to *admissions* of one partner so as to take a debt out of the acts of limitations. In some states such admissions after a dissolution have no effect in rendering liable the other partners upon debts which are barred,¹⁴⁸ while in others, such acknowledgment of a partnership debt is sufficient to take it out of the statute.¹⁴⁹

1518. As the partnership is a species of moral being, entitled to or liable on all contracts it may make, and owning property separate and distinct from that of the several partners, it follows that it is liable, and all its assets must be applied to the discharge of its social obligations before any part can be taken to pay the debts of the separate partners, or to reimburse any of them for advances which they may have made.

While all the partners are living and solvent, no creditor can enforce the payment of his claim against the joint effects or the separate property of the partners except by a common action at law. But when the dissolution takes place by the death or bankruptcy of one partner, then the rights of the creditors attach, and the joint creditors are entitled to be paid out of the assets of the partnership before the separate creditors of the insolvent or deceased partners. The reason for this is manifest: the separate creditors of one partner can pretend to no greater right than he had himself; and, as he can have no claim to the assets of the firm until all the debts of the partnership have been satisfied, they cannot claim to be paid out of the assets of the firm until all its debts have been paid.

When a partner dies, his personal representatives are not liable at law to the creditors of the partnership; their remedy there is against the surviving partners;¹⁵⁰ but they are liable in equity. In equity the partnership debts are held to be joint and several, and consequently the joint creditors have, in all cases, a right to proceed at law against the survivors, and an election also to proceed in equity against the estate of the deceased partner, whether the survivors be insolvent, bankrupt, or not.¹⁵¹

The case we have just considered is one where the separate estate was solvent; the case where both the partnership and the separate estate are insolvent presents another question, and the inquiry then is whether the debts are to be paid *pari passu* out of the estate of the deceased, or whether either is entitled to a preference. As a general rule, it may perhaps be stated that the joint creditors have a priority of right to payment out of the joint estate, and the separate creditors have a similar right over the private estate; and the surplus is divisible among the other class of creditors.¹⁵² But this rule seems to con-

¹⁴⁸ *Levy v. Cadet*, 17 Serg. & R. Penn. 126; *Yandes v. Lefavour*, 2 Blackf. Ind. 371; *Ward v. Howell*, 5 Harr. & J. Md. 60; *Wilson v. Torbet*, 4 Ala. 296; *Hackley v. Hastic*, 3 Johns. N. Y. 536; *Gleason v. Clark*, 9 Cow. N. Y. 57; *Brady v. Hill*, 1 Mo. 315; *White v. Union Ins. Co.*, 1 Nott & M'C. So. C. 556; *Tassey v. Church*, 4 Watts & S. Penn. 141; *Story, Partn.* §§ 323, 324; *Bell v. Morrison*, 1 Pet. 331; *Mann v. Locke*, 11 N. H. 246; *Brewster v. Hardeman*, Dudl. Ga. 138; *Morse v. Donelson*, 2 Humphr. Tenn. 166; *Bispham v. Patterson*, 2 M'Lean, C. C. 87.

¹⁴⁹ *Neal v. Hassan*, 3 M'Cord, So. C. 278; *Greenleaf v. Quincy*, 12 Me. 11; *Shepley v. Waterhouse*, 22 Me. 497; *Austin v. Bostwick*, 9 Conn. 496; *Patterson v. Choate*, 7 Wend. N. Y. 441; *Simpson v. Geddes*, 2 Bay, So. C. 533.

¹⁵⁰ *Bacon, Abr. Obligation*, D. 4; *Comyn, Dig. Abatement*, F. 8. In Pennsylvania a suit may be maintained against the executors of a deceased partner, the declaration averring the insolvency of the surviving partner. *Welsh v. Speakman*, 8 Watts & S. Penn. 257.

¹⁵¹ *Wilkinson v. Henderson*, 1 Mylne & K. Ch. 582; *Devaynes v. Noble*, 1 Mer. Ch. 529, 563; *United States v. Cushman*, 2 Sumn. C. C. 441; *Wilder v. Keeler*, 3 Paige, Ch. N. Y. 167; *Ransom v. Pomeroy*, 5 Blackf. Ind. 383; *Maxey v. Averill*, 2 B. Monr. Ky. 107.

¹⁵² *Murray v. Murray*, 5 Johns. Ch. N. Y. 60; *Bell v. Newman*, 5 Serg. & R. Penn. 78; *Allen v. Wells*, 22 Pick. Mass. 450; *Purple v. Cook*, 4 Gray, Mass. 120; *Dean v. Phillips*, 17 Ind. 406; *Moline Co. v. Webster*, 26 Ill. 233; *Lewis v. Conrad*, 11 Iowa, 153; *Crooker v. Crooker*, 46 Me. 250; *Treadwell v. Brown*, 41 N. H. 12.

flict with the principle adopted in equity, that all the debts due by a partnership are joint and several.¹⁵³

1519. The next object of our inquiries is to ascertain what is joint and what is separate property.

The joint estate of a partnership is that which belongs to the firm, and in which the partners have a joint interest, either at law or in equity, at the time of dissolution. The separate estate is that in which some of the partners, less than the whole number, have a separate interest, either at law or in equity, at the same period.

The separate estate may have belonged to the partnership, and been transferred to one of the partners before the dissolution. In such case, or where separate property has been so turned into joint property, *bona fide*, the estate will be considered joint or several, as it may have been so agreed; but in such case the title to the property must have been so transferred.¹⁵⁴

The fact that separate property was actually possessed and used by the partnership, for partnership purposes, at the time of dissolution, if it was merely for the accommodation of the partnership, does not change the property nor affect the rights of the separate partners.¹⁵⁵

When forming the partnership, it may be agreed what character property shall possess at the time of the dissolution, whether joint or separate; and such agreement will be binding upon the partners. The property will possess, at the time of the dissolution, that character which was agreed it should then possess.¹⁵⁶

1520. The effect of the dissolution upon the partners will be considered, with reference to the settlement of the affairs of the firm; to the debts and credits of each partner toward the partnership; to the division of the assets.

1521. There never was a partnership of any considerable extent whose affairs were so perfectly settled every day that at the moment of dissolution all that was due to it and all that it owed were precisely settled and ascertained, and where no dispute was likely to arise, proofs to be made, and accounts to be stated. To effect this there must be power somewhere to make a liquidation, a word perfectly understood in commerce. Although the dissolution so far destroys the authority of the several partners that they cannot enter into new contracts in the name of the firm, and if they do they may be held responsible for all consequences, yet, for the purpose of winding up the business of the partnership, they must possess all the requisite powers.¹⁵⁷

1522. It is not unusual, upon the dissolution of a partnership, for the partners to agree upon some one of the partners to liquidate the affairs of the firm. It sometimes occurs, also, that by the articles of partnership, one of the partners is appointed to settle the joint affairs upon a dissolution.

But if no such provision or agreement has been entered into, all the partners have an equal right to receive debts, settle accounts, and do other acts to wind up the affairs of the firm; and if any one should misapply the assets, or abuse the power conferred on him, he may be restrained by a court of equity by injunction.¹⁵⁸

¹⁵³ See Story, Partn. § 363; 3 Kent, Comm. 65; Grosvenor v. Austin, 6 Ohio, 103; Allen v. Wells, 22 Pick. Mass. 450; McCulloch v. Dashiell, 1 Harr. & G. Md. 96.

¹⁵⁴ Collyer, Partn. B. 4, c. 2, s. 1; Parish v. Lewis, Freem. Ch. Miss. 299; Clement v. Foster, 3 Ired. Eq. No. C. 213; Howe v. Lawrence, 9 Cush. Mass. 558; Reese v. Bradford, 13 Ala. n. s. 837; Allen v. Centre Valley Co., 21 Conn. 130; Bullitt v. Methodist Epia. Church, 26 Penn. St. 108; Robb v. Mudge, 14 Gray, Mass. 534.

¹⁵⁵ Collyer, Partn. B. 4, c. 2, s. 1.

¹⁵⁶ Gow, Partn. c. 5, s. 2; Crawshaw v. Collins, 15 Ves. Ch. 226.

¹⁵⁷ Story, Partn. § 329; Robbins v. Fuller, 24 N. Y. 570; Granger v. McGilvra, 24 Ill. 152.

1523. It sometimes happens that partners cannot agree as to who shall collect the assets or settle and wind up the social affairs. In such cases, if there has been any abuse, or any serious injury is likely to happen, a court of equity will appoint a receiver,¹⁵⁰ who will be authorized to collect, and, under the direction of the court, sell and dispose of the partnership property, and turn it all into cash. His accounts are afterward settled, and the money in his hands is divided, by order of the court, among such persons as are entitled to it, whether creditors or partners, in just proportions.

1524. When the partnership is dissolved by the death of one of the partners, the survivor or survivors are entitled to wind up the business of the firm, and the personal representatives of the deceased cannot interfere.¹⁶⁰ In case of gross abuse of this power, or where serious injury is likely to accrue, the settlement may be taken out of the hands of the survivors and placed in the hands of a receiver.¹⁶¹

1525. When one of the partners has been appointed to settle the affairs of the firm, he is generally invested with the same powers, as far as the settlement with third persons extends, as he possessed before the dissolution; for those powers being requisite for the settlement of the affairs, it is presumed they have not been annulled by the dissolution. He represents all the partners, and, in the absence of all fraud, his acts are binding upon them.

But as he is invested with power for the purpose of settlement only, he cannot bind his partners by entering into new contracts. Thus he may settle and pay accounts, but he cannot give the firm note in payment.¹⁶² He may indorse notes in the firm name when he is authorized to use it.¹⁶³ The objection to his indorsing without authority is that by so doing he would bind the firm as indorsers. He may assign a bond or note where he does not so bind the partners.¹⁶⁴

1526. The expenses of the liquidation and of winding up the business are to be borne by the assets of the firm, but no partner is allowed any compensation for his trouble and services in assisting in the arrangement and winding up of the business of the firm, unless a stipulation to the contrary has been made;¹⁶⁵ and if any advantageous settlement be made by him, the benefit shall accrue to all the members of the late firm.¹⁶⁶

1527. A receiver appointed by a court of equity, by assuming the duty, becomes a mandatary, and he is bound to use due diligence in the exercise of his appointment. He is generally required to give security for the faithful performance of his duties; and probably both himself and his sureties would be held responsible for his neglect; as, if having received a note belonging to the partnership, on which was a good indorser, he should neglect to present it, and

¹⁵⁰ *Law v. Ford*, 2 Paige, Ch. N. Y. 310; *Cox v. Peters*, 2 Beasl. N. J. 39.

¹⁶⁰ *Andrews v. Brown*, 21 Ala. n. s. 437; *Dwinel v. Stone*, 30 Me. 386; *Howard v. Priest*, 5 Metc. Mass. 585; *Egbert v. Woods*, 3 Paige, Ch. N. Y. 517; *Allen v. Hill*, 16 Cal. 113.

¹⁶¹ *Collyer, Partn. B. 2, c. 1, s. 1*; *Connor v. Allen*, 1 Walk. Ch. Mich. 371; *Evans v. Evans*, 9 Paige, Ch. N. Y. 178.

¹⁶² *Perrin v. Keene*, 19 Me. 355; *Chase v. Kendall*, 6 Ind. 304; *Palmer v. Dodge*, 4 Ohio, St. 21; *Fowler v. Richardson*, 3 Sneed, Tenn. 508; *Long v. Story*, 10 Mo. 636.

¹⁶³ *Simmons v. Curtis*, 41 Me. 373; *Fellows v. Wyman*, 33 N. H. 356.

¹⁶⁴ *Morse v. Bellows*, 7 N. H. 568; *Milliken v. Loring*, 37 Me. 408.

¹⁶⁵ *Wittle v. Farlane*, 1 Knapp, Priv. Coun. 312; *Heathcote v. Hulme*, 1 Jac. & W. Ch. 122. This rule applies where the affairs are settled by a surviving partner. *Washburn v. Goodman*, 17 Pick. Mass. 519; *Hite v. Hite*, 1 B. Monr. Ky. 179; *Patton v. Calhoun*, 4 Gratt. Va. 138; *Brown v. McFarland*, 41 Penn. St. 129. But compensation will be allowed where the representatives of a deceased partner elect to have the business carried on instead of being wound up at once.

¹⁶⁶ *Collyer, Partn. B. 2, c. 2, s. 1*; *Story, Eq. Jur. § 316*.

cause it to be protested for non-payment, by which the money was lost, he would be chargeable with the amount.

As in the case of the settlement made by a partner, the expenses attending the winding up of the business must be borne by the social assets; and he will be entitled to a just compensation for his services.

1528. After having collected the whole of the assets of the partnership and paid the debts due by the firm, the next operation is to settle the accounts between each of the partners and the partnership before a division can take place among them.

Before attempting to do this, the accounts of the liquidating partner, since the dissolution of the partnership, ought to be first settled. He ought to produce his books and vouchers, where they can be reasonably expected, for all the sums received and paid; but in such cases it is usual to make a liberal settlement, and to admit charges which have the appearance of having been properly made of disbursements; as, for example, expenses of travelling on account of the partnership.

The books of the firm ought to show the true state of the partner's separate accounts, and each partner is required to keep an account of his own transaction with the partnership always ready for inspection.¹⁶⁷

Upon the settlement, each partner becomes chargeable with all the debts and obligations which he owes to the partnership, and interest upon them, and with all the profits which he has made out of the partnership effects during the partnership, or since the dissolution, whether the same has been made rightfully or by misapplication, or unlawful use of the funds or property of the firm.¹⁶⁸ He is chargeable also with interest on the amount of capital which he bound himself to furnish, and which he did not. In all cases of advances received from the firm, he is chargeable with the amount and interest.

1529. On the other hand, he is entitled to a credit for all advances he has made to the firm, and for all interest on such sums. He has a right to be credited for all sums he has expended for the firm, or which he has been subject to pay, necessarily, while he was transacting the affairs of the partnership.¹⁶⁹ Take, for example, a case put by Pardessus: A partner, while engaged in the business of the firm, on a journey, is robbed, and a number of articles are taken from him which were his own property, and which were proper and necessary for him to have on his journey; he is entitled to a credit with the firm for their value, the loss being a necessary consequence of the business of the partnership, and a fair charge against it.

In the absence of any stipulation a partner is not entitled to any compensation for his time and skill, however unequal may have been the services performed by the different partners.¹⁷⁰

1530. When there has been a positive stipulation between the partners as to the manner in which an account should be stated, that mode must of course be adopted, unless the partners by their own acts or conduct have abandoned it. In the absence of all agreements, if the parties cannot adopt some plan of settlement, a court of equity, in settling the accounts between the partners, will

¹⁶⁷ Collyer, Partn. B. 2, c. 2, s. 1; *Rowe v. Wood*, 2 Jac. & W. Ch. 553; *Goodman v. Whitcomb*, 1 Jac. & W. Ch. 569.

¹⁶⁸ Pardessus, Dr. Com. n. 1078.

¹⁶⁹ Thus a partner may be allowed taxes, advertising, and clerk-hire caused by the partnership trade in connection with the partner's separate property employed therein. *Foster v. Goddard*, 1 Black, 506.

¹⁷⁰ *Utley v. Smith*, 24 Conn. 290; *Zimmerman v. Huber*, 29 Ala. n. s. 379; *Hill v. Matta*, 12 La. Ann. 179; *Lyman v. Lyman*, 2 Paine, C. C. 11; *King v. Hamilton*, 16 Ill. 190; *Caldwell v. Lieber*, 7 Paige, Ch. N. Y. 483; *Levi v. Karrick*, 13 Iowa, 344.

take the accounts which have been settled between the parties to be correct unless some errors are pointed out, which will then be corrected, and cause an account to be stated from that time. If there has been no account stated, or any express or implied settlement, then the accounts must be stated from the commencement of the partnership. If, in case of the death of a partner, the survivors have employed the capital without authority, the profits which they have made will be considered as capital, and as joint property subject to all just deductions.¹⁷¹

1531. The division of the surplus will be considered under two heads: of the things to be divided, and of the manner of making the division.

1532. The division cannot be made until after a liquidation has taken place and the rights of the respective partners have been ascertained. For this purpose all the profits which have been made by a partner, whether openly in the general transaction of the social business or in a clandestine manner, contrary to his duty as a partner, by carrying on the same or another trade for his private advantage, and in a manner injurious to the interest of the partnership, must be brought into the assets of the firm;¹⁷² for when the profits arise from the capital or labor belonging to all the partners, they must be divided amongst them all.

The assets consist of every thing which belongs to the partnership, whether the property be real or personal, and whether it consists of choses in possession or choses in action. The partners have a right to insist that all the property shall be turned into money. But it not unfrequently happens that such articles as have not been sold or disposed of are divided among them.

Choses in action, which are classified into good, doubtful, and bad, are also sometimes divided equitably among partners.

With regard to the trade-marks and good-will of the establishment, the right to use the one or enjoy the other is generally allotted to one of the partners; but they must be sold if insisted on.¹⁷³ If nothing has been agreed upon in relation to trade-marks, it seems but reasonable that those who continue the business may use them, provided the use of them shall not be injurious to the other partners, by making it known by proper advertisements that they no longer designate the same establishment.

1533. In the division of the property, which we will suppose has all been reduced to cash in the first place, each of the partners is to be returned such advances as he has made to the firm. The remainder of the assets are divided in proportion to the amount of the capital stock which each partner has furnished, unless there has been a different mode of division agreed upon by the articles of agreement. In that case the division must be made as agreed upon.

¹⁷¹ Willet v. Blanford, 1 Hare, Ch. 258; Collyer, Partn. B. 2, c. 3, s. 4.

¹⁷² Waring v. Cram, 1 Pars. Eq. Cas. Penn. 516.

¹⁷³ Holden v. McMakin, 1 Pars. Eq. Cas. Penn. 270.

CHAPTER XIV.

TITLE TO PERSONAL PROPERTY BY OPERATION OF LAW.

- 1534-1543. Title by marriage.
- 1536-1538. Title to chattels in possession.
 - 1537. Chattels personal.
 - 1538. Chattels real.
- 1539-1543. Title to choses in action.
 - 1541. By what capacity husband takes.
 - 1542. What is a conversion.
 - 1543. The wife's equity.
- 1544-1557. Title by intestacy.
 - 1547. Appointment of administrator.
- 1548-1557. Kinds of administrators.
- 1549-1551. General administrators.
 - 1550. General administrator of an intestate estate.
 - 1551. General administrator *cum testamento annexo*.
- 1552-1557. Special administrators.
 - 1553. Administrators with limited authority over the estate.
 - 1555. Administrators with limited authority as to time.
 - 1558. Title by forfeiture.
 - 1560. Title by judgment.
 - 1562. Title by bankruptcy.
 - 1564. Title by insolvency.
 - 1565. Title by testament.

1534. Having examined the law by which title is vested in property by original occupancy ; by acts of war ; and by contract, or the acts of the parties, it will be proper now to consider how title is vested in property by operation of law. This may be by marriage, by intestacy, by forfeiture, by judgment, and by bankruptcy or insolvency.

1535. By the common law the husband becomes liable for the debts of the wife incurred before marriage, and they may be recovered by a joint action against him and his wife during the coverture.¹ To balance this liability the law vests in him, by the marriage, all the personal chattels which were in her possession at the time of the marriage, and her other personal property *sub modo*. He is also entitled to certain rights in her real estate which will be considered in another place.²

¹ By the civil law, the property of the husband and wife is held in a kind of community or partnership, so that the wife's share cannot be disposed of by the husband, nor sold for his debts. In Louisiana, the rights of the husband and wife are regulated by the code, B. 3, t. 6.

² The rule of the common law has been changed and modified by statute in most of the states. The personal property of the wife continues to be her separate property after marriage in New York, Pennsylvania, Massachusetts, Michigan, Maine, Minnesota, Wisconsin, California, and Alabama, and in Iowa under certain limitations. In Texas there is a community of goods subject to control of the husband. N. Y. Stat. 1848, Ch. 200 ; Penn. Stat. April 11, 1848 ; Mass. Gen. St. Ch. 108 ; Mich. Comp. St. 1857, art. 16 ; Me. Rev. St. Ch. 61 ; Minn. St. 1858 ; Wisc. Rev. St. Ch. 95 ; Cal. Stat. 1858, Ch. 22 ; Ala. Stat. 1850, Ch. 23 ; Iowa, Stat. 1860, § 2489 ; Tex. Digest, p. 312.

1536. A distinction is made between her chattels personal and her chattels real.

1537. All the wife's chattels personal in possession vest immediately in the husband. Money, furniture, and the very setting out the wife has received from her father, belong to the husband, immediately on the marriage; but from this general rule must be excepted the wife's clothing and paraphernalia suitable to her station in life; and though he might, in his lifetime, give away or sell her jewels and ornaments, yet, if he dies without having disposed of them, they will belong to her after his death, for he cannot bequeath them by his will.

1538. A *chattel real* vests in the husband, not absolutely, but *sub modo*; as, in the case of a lease for years, the husband is entitled to receive the rents and profits of it, and may, if he pleases, sell, surrender, or dispose of it during the coverture, and it is liable to be taken in execution for his debts; if he survives her, it becomes immediately his own.

But in case the wife survives him, and such chattels remain undisposed of by the husband, so that the property has not been changed, the right to it survives to the wife, for, as before observed, he cannot bequeath it by his will.³

1539. At common law the husband is entitled to the wife's *choses in action*, and he may reduce them to possession or sell them, and then they become his absolutely. But if in his lifetime he does not so dispose of them, at his death they survive to the wife, and she takes them in her own original right, without administering to the estate of her husband, and they will not be liable for his debts.⁴ On the death of the wife, her *choses in action* do not, strictly speaking, survive to the husband, but he may recover them as her administrator, and after paying her debts, *dum sola*, for which he will be responsible though as husband, he will then be no longer liable for them; they will belong to him. This right is given to him by the English statute of 22 and 23 C. II, commonly called the statute of distributions, and the statute of 29 C. II, c. 3, s. 25, the provisions of which statutes have been re-enacted in most of the United States.⁵

1540. Questions frequently arise as to the right by which the husband takes, what is a sufficient transfer of a *chose in action* to deprive the wife of her right as survivor, and to what equity the wife is entitled in her *choses in action*. These will be separately examined.

1541. The husband cannot take under the statute of distribution as *next of kin* to his wife, for they do not bear that relation to each other;⁶ he takes under the character of *husband*.

Statutory provisions exist in most of the states, securing to the wife her separate property acquired after marriage, and allowing her to engage in trade as a *feme sole*. In general the assent of the husband is required to enable her to dispose of her separate property. In some states the rule of the common law exists, and property acquired by the wife after marriage vests immediately in the husband. *Skillman v. Skillman*, 2 Beasl. N. J. 403; *Quigly v. Muse*, 15 La. Ann. 197. See *Hall v. Young*, 37 N. H. 134. Personal property in the possession of the husband or in the possession of both is presumed to belong to the husband. *Gillespie v. Miller*, 37 Penn. St. 247; *Vaden v. Vaden*, 1 Head, Tenn. 444; *Young v. Ward*, 21 Ill. 223; *Commonwealth v. Williams*, 7 Gray, Mass. 337.

³ Coke, Litt. 351, a.

⁴ Coke, Litt. 351; 2 Sharswood, Blackst. Comm. 434.

⁵ *Biggest v. Biggest*, 7 Watts, Penn. 563; *Hoskins v. Miller*, 2 Dev. No. C. 360; *Whitaker v. Whitaker*, 6 Johns. N. Y. 112; *Bryan v. Rooks*, 25 Ga. 622; *Ryder v. Hulse*, 24 N. Y. 372. The common law in regard to the wife's *choses in action* has been modified by statute in the same manner as in regard to her other separate property, and after her death an action to reduce the chose into possession must be brought by her representatives and not by the husband. *Willis v. Roberts*, 48 Me. 257; *Sharp v. Burns*, 35 Ala. n. s. 653.

⁶ *Watt v. Watt*, 3 Ves. Ch. 246; *Garrick v. Camden*, 14 Ves. Ch. 381; *Anderson v. Dawson*, 15 Ves. Ch. 537; *Bailey v. Wright*, 18 Ves. Ch. 49, 55.

1542. By collecting money due on a bond, or note, or other *chose in action*, the husband appropriates it to his own use, and by that conversion makes it his own, unless, indeed, he manifests an intention to preserve it for his wife.⁷

An actual sale of the *chose in action* will transfer it to the purchaser divested of the wife's right;⁸ but a general assignment in bankruptcy, or under insolvent laws, will not pass her property or right of survivorship,⁹ and if the husband die before the assignees reduce it to possession, it will survive to her.¹⁰ Nor will an assignment by the husband of the wife's chose in action as a collateral security deprive her of her right of survivorship.¹¹

Obtaining a judgment in his own name for the purpose of recovering such chose in action will deprive the wife of her survivorship, but if the judgment be in favor of the husband and wife jointly, her right survives.¹²

To deprive the wife of the right of survivorship the conversion must be made by the husband as such, and not in a representative capacity.¹³

Bringing an action by the husband is a sufficient reduction into possession, although he die before judgment.¹⁴

1543. When the husband is compelled to go into chancery in order to recover a chose in action, before he will be permitted to recover, he will be required to make a reasonable provision out of it for the maintenance of his wife and children, on the ground that he who asks equity must do equity. It matters not, therefore, whether the suit for the wife's debt, legacy, or portion be instituted by the husband himself or by his assignees; in either case, a just settlement on the wife must first be made of a portion of the property; and this provision is not to be proportioned merely to that part of the wife's equitable right that the complainant seeks to recover, but to the whole of her personal fortune, including what the husband had previously received.¹⁵

The right of the wife to have a provision made for her is called the wife's equity.¹⁶

1544. When a man dies without a will he is said to die *intestate*, and the state or condition of his estate is an *intestacy*. The real estate of which he was seized at the time of his death passes by operation of law to his heirs by descent, and his personal property becomes vested in any one who may be lawfully appointed

⁷ It was held in Pennsylvania, that taking possession is not in all cases conclusive, though it may be considered as *prima facie* evidence of conversion. On proof being made that he held the money as her trustee, his estate would be liable. *Estate of Hinds*, 5 Whart. Penn. 138. See *Stanwood v. Stanwood*, 17 Mass. 57; *Marston v. Carter*, 12 N. H. 159; *Phelps v. Phelps*, 20 Pick. Mass. 556; *In Re Gray's Estate*, 1 Penn. St. 327; *Timbers v. Katz*, 6 Watts & S. Penn. 290; *Barber v. Slade*, 30 Vt. 191.

⁸ *Hill v. Townsend*, 24 Tex. 575; *Lynn v. Bradley*, 1 Metc. Ky. 232. But the assignment must be for a valuable consideration.

⁹ It is well settled that an assignment in bankruptcy or insolvency vests in the assignee all the husband's rights including the right to reduce to possession. *Smith v. Chandler*, 3 Gray, Mass. 392. And as the assignee would be guilty of a breach of trust in not reducing the choses to possession, the question raised in the text would not be likely to occur unless their existence was fraudulently concealed.

¹⁰ This is the general rule, though in Pennsylvania, owing to the force of certain expressions in the act of Assembly, the choses in action of the wife pass to the assignees of an insolvent, not subject to her right of survivorship. *Richwine v. Heim*, 1 Penn. 373.

¹¹ *Hartman v. Dowdel*, 1 Rawle, Penn. 279; contra, *Tritt v. Colwell*, 31 Penn. St. 228.

¹² *Oglander v. Baston*, 1 Vern. Ch. 396; *Stewart's Appeal*, 3 Watts & S. Penn. 476; *Knight v. Brawner*, 14 Md. 1.

¹³ *Estate of Kintzinger*, 2 Ashm. Penn. 455; *Mayfield v. Clifton*, 4 Ala. 375.

¹⁴ *Teneick v. Flagg*, 5 Dutch. N. J. 25.

¹⁵ *Dearing v. Fitzpatrick*, 1 Meigs, Tenn. 551; *Kenny v. Udal*, 5 Johns. Ch. N. Y. 464; 1 Beav. Rolls, 593; *Howard v. Moffat*, 2 Johns. Ch. N. Y. 206; *Dumond v. Magee*, 4 Johns. Ch. N. Y. 318; *Duval v. Farmers' Bank*, 1 Gill & J. Md. 282; *Durr v. Bowyer*, 2 M'Cord, Eq. So. C. 368. See *Rees v. Waters*, 9 Watts, Penn. 90.

¹⁶ *Shelford, Marr. & D.*; *Bouvier, Law Dict. Wife's Equity*.

his administrator, to manage his estate in his place, distribute it according to law, and to represent the intestate. The administrator does not receive the personal property for his own use; he is a mere trustee to administer it for the purpose of paying the intestate's debts and distributing the surplus, after paying the just expenses of his administration, to the next of kin of the intestate.¹⁷

1545. By the term *next of kin* is meant the relations of a party who died intestate. In general, no one comes within the term who is not included within the provisions of the statute of distribution. A wife cannot claim as next of kin to her husband, nor a husband as next of kin to his wife; and, under the intestate laws, this is perhaps always the case.¹⁸

1546. To understand this subject we must ascertain who may be appointed an administrator and by whom he is to be appointed, the several kinds of administrators and their various powers.

1547. When the rights of men were but little understood in England, the king, and afterward the clergy, seized upon all vacant estates, and so much abuse prevailed that but little of what a man left at his death benefited his family. The clergy, with their usual avidity, seized the goods of the intestate, and were allowed to give, alien, or sell them, at their will, and dispose of the money in *pious usus*; and, as the reverend prelates were not accountable to any but God and themselves for their conduct,¹⁹ it is not surprising that so much abuse prevailed.

In the United States, happily, the clergy have no jurisdiction in cases of this kind. The power to grant administration is vested in certain public officers, known in the several states by different names, such as judge of probate, ordinary, register of wills, and for granting administrations, surrogates, orphan's courts, and other names expressive of their authority.

The provisions of the acts of each state point out the persons who are to be appointed, and the order in which they are to be chosen, leaving, in general, a discretion with the appointing officer in the selection of individuals out of classes.²⁰

1548. Administrators are of several kinds each having powers, and being bound by obligations different from each other; it will be requisite, therefore, to examine them separately. Administrators are general, or those who have a right to administer the whole estate of the deceased; or special—that is, those who administer it but partially or but for a limited time.²¹

¹⁷ The heirs and next of kin may by agreement among themselves pay the debts and divide the estate without the intervention of an administrator, and other parties cannot interfere or prevent such a disposition. *Taylor v. Phillips*, 30 Vt. 238.

¹⁸ Where property is given by will to the next of kin, it may, owing to circumstances, be construed so as to include husband or wife under this designation. *Hovenden*, Fr. 288, 289; 1 Mylne & K. Ch. 82.

The statutes of distribution usually provide that the husband or wife shall take a certain share; this they take entirely by virtue of the statute. *Brigham v. Maynard*, 9 Gray, Mass. 81; *Cross v. Carey*, 25 Ill. 562; *Loring v. Craft*, 16 Ind. 110; *Hilderbrand's Appeal*, 39 Penn. St. 133; *Coleman v. Brooke*, 37 Miss. 71; *Robinson v. Tuttle*, 37 N. H. 243.

¹⁹ *Plowd.* 277; 2 *Sharswood*, Blackst. Comm. 495.

²⁰ The order of precedence is usually:

First. The husband or wife. *Weaver v. Chace*, 5 R. I. 356.

Second. The next of kin, the degrees being reckoned according to the civil law.

Third. The creditors.

The appointing officer in general is guided by the wishes of the distributees in his notice in the different classes.

A creditor has no claim to be appointed in Texas. *Cain v. Haas*, 18 Tex. 616.

A married woman cannot be an administrator unless her husband assents. *Nickelson v. Ingram*, 24 Tex. 630.

²¹ When personal assets are situated in another state than the domicile of the intestate, the administrator appointed by the state of the domicile has no power over such assets.

1549. *General administrators* are of two kinds: those appointed to administer the estate of a man who died intestate, and those who administer the estate of a man who made a will.

1550. When a man dies without having made a will, the most usual administration granted on his estate is to authorize the administrator to manage the whole estate for as long a time as may be requisite to make a final settlement; so that his power is unlimited as to time or as it regards the estate.

By the grant of letters of administration to such an administrator, he is invested with full and ample power to take possession of all the personal estate of the deceased, and to make an inventory of the same, which he is required to file with an officer appointed by law; to give such surety as is required by the statute, to collect all the debts he can which were due to the intestate at the time of his death, and to represent him in all things which relate to his chattels real or personal.²³

The statutes of distribution in the several states are copied, with certain modifications, from the English statute 22 and 23 Car. II, c. 10, which was itself borrowed from the 118 Novel of Justinian. It is not within the plan of this work to state in detail the provisions of the acts of the legislature of each state.²³

A question of very general importance frequently arises as to the law which is to govern in the distribution of personal property, whether such property be given by will, or whether it be transmitted by intestacy or succession, when it is found in different states or countries. A general rule has been adopted, that personal property, wherever situated, shall be distributed according to the law of the testator or intestate's domicile at the time of his death, and not by the conflicting laws of the states where the goods happened to be.²⁴ Real estate is governed by the law of the place where it is situated.²⁵

1551. Administration *cum testamento annexo* is granted when the deceased has made a will, and either has not appointed any executor, or those appointed have refused to serve, or are dead or otherwise incapable to execute the will; the

being a *foreign administrator*, and as such his authority will not be recognized. *Naylor v. Moffatt*, 29 Miss. 126. In this case, *ancillary administration* is granted by the state in which the assets are situated, which is subordinate to the principal administration and limited to such assets. *Atkinson v. Rogers*, 14 La. Ann. 633.

It is held in several cases that a foreign administrator may sue for the property or debts of the intestate. *Moore v. Fields*, 42 Penn. St. 467; *Crawford v. Graves*, 15 La. Ann. 154. But the better rule is that he cannot sue without taking out ancillary administration. *McClure v. Bates*, 12 Iowa, 77; *Naylor v. Moffatt*, 29 Mo. 126; *South-western R. R. v. Paulk*, 24 Ga. 356.

²³ An administrator may sell the personal property without an order of court, and it is his duty to sell so much as is needed to pay the debts of the intestate. In some states, if he sells without an order of court, he is liable for the appraised value of the property, if it sells for less, and can protect himself from such loss only by an order beforehand. *Munteith v. Rahn*, 14 Wisc. 210; *Ikelheimer v. Chapman*, 32 Ala. N. S. 676. He can sell the real estate only when the personal property is insufficient to pay the debts, but only upon an order of the court. *Lamson v. Schutt*, 4 All. Mass. 359; *Haynes v. Meeks*, 20 Cal. 288; *Stow v. Kimball*, 28 Ill. 93; *Gladson v. Whitney*, 9 Iowa, 267; *Tilton v. Tilton*, 41 N. H. 479; *Carey v. Dennis*, 13 Md. 1.

A decree of the proper court ordering a sale is conclusive, and a sale in accordance with such decree cannot be set aside. *Simson v. Norton*, 45 Me. 281; *George v. Watson*, 19 Tex. 354.

The administrator cannot purchase the property himself. *Hoitt v. Webb*, 36 N. H. 158.

²⁴ See Kent, Comm. Lect. 37.

²⁵ Story, Conf. Laws, c. 11; *Desesbats v. Berquiers*, 1 Binn. Penn. 336; *Dixon v. Ramsay*, 3 Cranch, 319; *United States v. Crosby*, 7 Cranch, 115; *Kerr v. Moon*, 9 Wheat. 365; *Harvey v. Richards*, 1 Mas. C. C. 381; *Holmes v. Remsen*, 4 Johns. Ch. N. Y. 460; *Johnson v. Copeland*, 35 Ala. N. S. 521; *Hill v. Townsend*, 24 Tex. 575; *Farmers' Bank v. Brewer*, 27 Conn. 600; *Warren v. Hofer*, 13 Ind. 167.

²⁶ *Eyre v. Storer*, 37 N. H. 114; *Lapham v. Olney*, 5 R. I. 413.

officer authorized to grant letters of administration commits administration to those who have the most interest in husbanding the assets; a residuary legatee is preferred.

The administrator is bound to collect the debts and perform the duties generally of a general administrator, and in the distribution of the assets he is governed by the will, a copy of which is annexed to the letters of administration.

1552. *Special administrators* are of two kinds: first, those who are appointed, whose authority is confined to a part of the estate; and, secondly, those whose authority is limited as to time.

1553. Administrators with limited authority over the estate are of two kinds.

When an administrator has been appointed, and, after having administered a part of the estate, dies, leaving a part of the estate not administered, or where there are debts remaining unpaid,²⁸ an administrator is appointed to administer the remainder of the estate. He is called an administrator *de bonis non*. He has all the power of a common or general administrator with regard to the estate committed to his charge.²⁷

He cannot call the previous administrator to an account for waste or breach of duty. This right belongs only to the heirs, distributees, or creditors;²⁸ there is no privity between the two administrators.

1554. When an executor is appointed by will, and after having administered a part of the estate he dies, or otherwise becomes incapable, or is removed, an administrator is appointed to administer the remainder of the estate. As this administrator must administer the estate so as to carry out the will of the testator, the will is attached to his administration, and he is therefore called an administrator *de bonis non, cum testamento annexo*.²⁹

1555. There are three kinds of administrators, with limited authority as to time. When the executor named in a will is an infant, and has not legal capacity to execute the will, the interests of the estate require that some one should be authorized to attend to them; for this purpose an administrator is appointed, whose authority is to continue until the executor shall attain the age required by law, which at common law is seventeen years, but by statutory provisions in several states, it is fixed at twenty-one years.³⁰ He is called an administrator *durante minore etate*. His powers extend to administer the estate so far as to collect the same, sell a sufficiency of the personal property to pay the debts, sell *bona peritura*, or such perishable goods as belong to the estate, and perform such other acts as require immediate attention. He may sue and be sued.³¹

1556. When an executor has been appointed to execute a will, and at the time of the testator's death he is absent, the estate in the mean time requiring to be attended to, an administrator *durante absentia* is appointed. The powers of this administrator continue until the return of the executor, and then they cease upon the probate of the will by the executor.³² If the executor should die abroad, the powers of the administrator *durante absentia*, it seems, would not cease by that event.³³

1557. An administrator *pendente lite* is one to whom administration is granted pending the controversy respecting an alleged will. Such administration has

²⁸ *Brattle v. Converse*, 1 Root, Conn. 174; *Chapin v. Hastings*, 2 Pick. Mass. 361.

²⁷ *Bacon, Abr. Executors*, B. 1; *Short v. Johnson*, 25 Ill. 489; *Blake v. Dexter*, 12 Cush. Mass. 559.

²⁸ *Store v. People*, 25 Ill. 600; *American Board's Appeal*, 27 Conn. 344.

²⁹ *Comyn, Dig. Administrator*, B. 1.

³⁰ See *Godolphin*, Orph. Leg. 102; 5 Coke, 29.

³¹ *Bacon, Abr. Executors*, B. 1; *Rolle, Abr.* 110; *Croke, Eliz.* 718.

³² In the goods of *Cassidy*, 4 Hagg. Eccl. 360.

³³ *Taynton v. Hannay*, 3 Bos. & P. 26.

been granted pending a contest as to who is, by law, entitled to administration.³⁴ This administrator is merely an officer of the court, and holds the property till the suit terminates; he can make no distribution, though he may bring suits.³⁵

1558. *Forfeiture*, applied to lands as well as to goods, is a punishment annexed by law to some illegal act or negligence in the owner of lands, tenements, or hereditaments, whereby he loses his interest therein, and they go to the party injured as a recompense for the wrong which he alone, or the public together with him, has sustained.³⁶

When we come to consider the transfer of real estate we shall examine the law as to forfeiture of land; now our observations will be confined to the forfeiture of goods.

By the constitution of the United States,³⁷ it is declared that no attainder of treason shall work corruption of blood, or forfeiture, except within the life of the person attainted. And by the act of congress of April 30, 1790, s. 24,³⁸ it is enacted, that no conviction or judgment for any of the offences aforesaid shall work corruption of blood or forfeiture of estate. As the offences punished by this act are of the blackest dye, including cases of treason, the punishment of forfeiture for crimes unconnected with property may be considered as abolished by the general government. The forfeiture of estates for such crimes is very much reduced in practice in this country, and when it occurs the state takes the title the party had and no more.³⁹

In general, forfeiture for crimes is abolished in the several states, though perhaps the punishment exists in some of them, and in one of them the power is limited to the cases of treason and murder.⁴⁰

1559. But forfeitures often take place where a legislative act declares that the performance of a certain action, or the omission to perform what it commands, shall be followed by the forfeiture of a thing. The revenue laws of the United States furnish abundant examples of this kind. It may be stated as a general rule that the title to the thing forfeited does not vest in the party to whom it is given without a judicial proceeding declaring the forfeiture, and without hearing the party to whom the goods and chattels belong.⁴¹

1560. The fourth manner of acquiring title by operation of law is by *judgment*. A judgment is a decision or sentence of the law given by a court of justice or other competent tribunal as the result of proceedings instituted therein for the redress of an injury. It is not every judgment, however, that vests in the successful plaintiff any property. In some cases the judgment is, that the plaintiff shall recover the possession only, while in others he recovers the property. When he recovers the property, it is evident that the title to it is changed; but when he recovers the possession, the title, being in him before recovery, is not changed by operation of the judgment.

When the plaintiff sues in trover or trespass, and he recovers the value of a

³⁴ Walker v. Woollaston, 2 P. Will. Ch. 589.

³⁵ Knight v. Duplessis, 1 Ves. Sen. Ch. 325. In most of the states *public administrators* are appointed, who take charge of the estates of intestates leaving no next of kin qualified or willing to accept the trust. They are governed entirely by statute, and have the power of general administrators.

³⁶ 2 Sharswood, Blackst. Comm. 267.

³⁷ U. S. Const. Art. 3, s. 3.

³⁸ 1 Stat. 117.

³⁹ Borland v. Dean, 1 Mas. C. C. 174.

⁴⁰ Md. Const. During the rebellion in 1861 acts were passed confiscating all goods and vessels going to or from the states in rebellion, all vessels belonging to the inhabitants of said states, all property used in promoting the insurrection, all the property of persons acting as officers of the so-called Confederate States. Acts of Congr. July 13, 1861, 12 Stat. 257; Aug. 6, 1861, 12 Stat. 319; July 17, 1862, 12 Stat. 690.

⁴¹ Fire Department v. Kip, 10 Wend. N. Y. 266.

specific chattel, of which the possession had been acquired by the defendant by a wrongful act, the title of the goods is altered by the recovery,⁴² and it becomes vested in the defendant. But, according to some authorities, the title to the property is not fully vested until the defendant has made satisfaction.⁴³

1561. In some cases a man has no right until the commencement of the action and the rendition of the judgment gives him the title. Such, for instance, is an action upon a penal statute, which gives the right of action to any one who will sue for the violation of the statute. In this kind of popular action, he who, in good faith, brings the first suit will be entitled to recover, and the judgment will vest in him a right to recover the amount for which it is given in his favor.

When a man has sustained an injury either in his property, his person, or his relative rights, as trespass, assault and battery, slander, or criminal conversation with plaintiff's wife, he acquires a right to sue for the recovery of a compensation, which the law awards him in damages. The amount of such damages is ascertained by the verdict of a jury, and the right to them is fixed by the judgment of the court. Costs, which are given by statute, may be assimilated to damages received for a tort.

1562. A fifth mode of acquiring title to personal property is by *bankruptcy and insolvency*. The constitution of the United States authorizes congress to establish uniform laws on the subject of bankruptcies throughout the United States.⁴⁴ This power is exclusive wherever it is exercised, and suspends all state laws on the subject,⁴⁵ but when it is not exercised, the states may legislate in the matter, so long as they do not conflict with other provisions of the constitution. Congress exercised this power by the passage of the act of April 4, 1800; this act was repealed on the nineteenth of December, 1803, before the time had elapsed which was limited for its existence. A second bankrupt law was passed on the nineteenth day of August, 1841, which was repealed by the act of March 3, 1843. A third law was passed on the second day of March, 1867, which is still in force.⁴⁶ The state insolvent laws are therefore now suspended.

1563. The term bankrupt in the English law is limited to those who have done or suffered to be done some act which the law declares to be an act of bankruptcy. This definition still holds good for all cases of involuntary bankruptcy where the proceedings are commenced by the creditors. But under the existing law a bankrupt is also one who owes debts which he is unable to pay, and upon application to the court he is adjudged a bankrupt. The object of the bankrupt law is twofold. First, the application of the bankrupt's property to the payment of his debts *pro rata*. To accomplish this the bankrupt surrenders his property, an assignee is elected by the creditors or appointed by the court, and the court by deed of assignment transfers all the bankrupt's property to the assignee, who, after paying the costs, divides it among the creditors, who prove their claims. This effects a complete transfer of title.

The second object of the law is the discharge of the bankrupt. If he conforms to his duty under the law, the court will, in six months after the commencement of the proceedings, grant him a discharge, discharging him from all debts and claims which existed against him at the date of the commencement

⁴² *Rogers v. Moore*, 1 Rice, So. C. 60; *Robertson v. Montgomery*, 1 Rice, So. C. 87; *Chartran v. Smith*, 1 Rice, So. C. 229; *Marsh v. Pier*, 4 Rawle, Penn. 273; *Cook v. Cook*, 2 Brev. So. C. 349; *Morrell v. Johnson*, 1 Hen. & M. Va. 449.

⁴³ *Osterhout v. Roberts*, 8 Cow. N. Y. 43; *Jones v. McNeil*, 2 Bail. So. C. 466; *Hopkins v. Hersey*, 20 Me. 449.

⁴⁴ U. S. Const. art. 1, sec. 8, no. 5.

⁴⁵ *Griswold v. Pratt*, 9 Metc. Mass. 16.

⁴⁶ 14 Stat. 517.

of proceedings, so that neither he nor his property acquired after his petition can be held for such debts.

1564. By *insolvency* is meant the state or condition of a person who is insolvent. The word *insolvent* itself has several meanings. It signifies a person who is not able to pay his debts.⁴⁷ A person is also said to be insolvent who is under a present inability to answer, in the ordinary course of business, the responsibility which his creditors may enforce by course of legal measures, without reference to his estate proving sufficient to pay all his debts when ultimately wound up.⁴⁸

It has been the wise policy of all polished nations to free the person of the debtor upon his doing what justice requires, namely, surrendering all his property for the benefit of his creditors. The several states of the Union have passed laws which have this effect, and all they require in general is that the debtor shall make a full surrender.

The state insolvent laws within their jurisdiction accomplish substantially the same object as the bankrupt law. By the constitution, "no state shall pass any law impairing the obligation of contracts."⁴⁹ But it is held that all contracts by citizens of a state are made with reference to the insolvent laws then existing, and may well be discharged by the subsequent insolvency of the debtor.⁵⁰ But its operation cannot be extended to contracts with citizens of other states,⁵¹ though with regard to these the law will prevent the enforcement of any remedy within its jurisdiction; and, conversely, a state will prevent its own citizens from proceeding against the insolvent's property in another state except for the general benefit of the creditors.⁵² An insolvent law, therefore, will take for the benefit of the creditors, first, all the insolvent's property within the state; second, all his property without the state, unless the rights of creditors, citizens of other states, have intervened. A discharge in insolvency will prevent any subsequent proceeding against the person or property of the insolvent in the courts of the state by which the discharge is granted. It will also bar the citizens of that state from proceeding in any other court. The citizens of other states will be barred only when they have become parties to the proceedings in insolvency by proving their debts.

1565. The form of wills or testaments which bequeath personal estate, and those which devise real property, and many of the rules which govern in the construction of wills being the same, the consideration of wills and testaments will be postponed until we come to inquire into the manner that title to real estate may be gained and lost.⁵³

⁴⁷ La. Civ. Code, art. 1980.

⁴⁸ See *Bayley v. Schofield*, 1 Maule & S. 338.

⁴⁹ U. S. Const. art. 1, s. 10, n. 1.

⁵⁰ *Ogden v. Saunders*, 12 Wheat. 218.

⁵¹ *Le Roy v. Crowninshield*, 2 Mas. C. C. 161.

⁵² *Dehon v. Foster*, 4 All. Mass. 543.

⁵³ Beyond, chapter xxviii.

CHAPTER XV.

CORPOREAL HEREDITAMENTS.

- 1566. Definition of real property.
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- 1586. The object and use of the thing annexed.
- 1587-1592. The character of the claimants.
- 1588. Between executor and heir.
- 1589. Between devisee and executor.
- 1590. Between tenant for life and remainderman.
- 1591. Between vendor and vendee.
- 1592. Between landlord and tenant.
- 1593. When fixtures must be removed.
- 1594. Tenements.
- 1595. Hereditaments.

1566. It is not within the plan of this work to enter into speculative theories as to the foundation of the right which society has to the soil, nor to inquire whether the title of the aborigines has been extinguished according to justice and equity. It is sufficient that we find ourselves in possession of the fair portion of America known as the United States, and that we hold it by virtue of law binding on all who have an interest in it. Such speculative views and theories are at best only calculated to gratify curiosity, or to justify acts which, in some instances, have a very doubtful morality for their basis.

On entering into the inquiry of the law relating to real estate, it will be perceived that the rules which govern this kind of property are, in general, arbitrary, technical, and artificial. One of the principal reasons for this is the fact that they were established during an age when the rights of the weak became an easy prey to the rapacity of the powerful, and when too often a technical reason or an artificial rule supplied the place of justice.

In the United States the right to property is secured by the constitution, so that it cannot be taken, either for public or private use, except in conformity to law. The government cannot deprive the weakest individual of his property, even for public purposes, although it still retains the eminent domain over it, without making a just compensation to the owner.

During the middle ages there existed on the continent of Europe, and in England, from which latter country we have derived many of the rules which govern real property, a political system which placed men and estates into hierarchical and multiplied distinctions of lords and vassals. The laws which supported this system were called feudal laws.¹

¹ The principles of the feudal law will be found in Littleton, Tenures; Wright, Tenures; Dalrymple, Hist. of Feudal Property; Sullivan, Lectures; Book of Fiefs; Spelman, Feuds

These laws vested all the lands in the country in the sovereign. The chief parcelled them out among the great men of the nation to be held of him, so that the king had the *dominium directum*, and the grantee or vassal had what was called the *dominium utile*. It was a maxim *nulle terre sans seigneur*. These tenants were bound to do services to the king, generally of a military character. These great lords, in their turn, granted part of the lands they thus acquired to other inferior vassals, who held under them, and were bound to perform services to these inferior lords, who were called mesne lords to distinguish them from the king, who was called the lord paramount.

The mesne lords merely held the land of the lord paramount by certain terms of tenure, but did not own the land, it being vested in the king. The interest in the land thus held was called a feud, a fief, or a fee, and they were known as vassals. The right remaining in the lord was called a seignory, which signifies simply a lordship. The estates which the mesne lords granted to their vassals were, by subinfeudations to other vassals, so reduced that they became small enough for cultivation. But even the lowest feudatories did not personally cultivate the soil. This laborious task was reserved for the conquered inhabitants, who were held in an abject state of slavery under the names of serfs or villeins.

The terms by which vassals of every grade held their property were upon two conditions, fealty and service. By fealty, *fidelitas*, was understood the obligation of the tenant to be faithful to his lord, and to defend him against all his enemies; he pledged himself to this allegiance by a certain form of obligation which was called homage. In law French the vassal said *jeo deveigne vostre home*; I become your man. Service was the recompense made to the lord for the use of the land; it consisted in attending him in his court during peace, and during war in his army. The terms of service were settled at the time of creating the feud, and reduced to writing by what was called a deed of feoffment. To complete the creation of the feud, a ceremony called corporeal investiture, which consisted in symbolical delivery of possession, took place. By this the lord, in the presence of the neighboring vassal, by a symbol, delivered possession of the land. This gave rise to the ceremony of livery of seisin.

Feuds were originally given for personal services rendered by the feudatory, and were only for life; but in the course of time they were granted to him and his heirs, and they became estates of inheritance.

The feudatory could not alien his estate, nor the lord his seignory, without mutual consent. This gave rise to attainments.²

In the course of time the military tenures were changed to civil tenures, such as grand sergeanty, petit sergeanty, free socage and villein socage.

Happily the feudal law never was in full vigor in the United States, though many of its principles are still retained; but they are so modified that the inconvenience arising from them is but little felt. "These principles are so interwoven with every part of our jurisprudence," says Chief Justice Tilghman,³ "that to attempt to eradicate them would be to destroy the whole. They are massy stones worked into the foundation of our legal edifice. Most of the inconveniences attending them have been removed, and the few that remain can easily be removed by acts of the legislature."

and Tenures; 2 Sharswood, Blackst. Comm. c. 5; The Capitularies; Pothier, Des Fiefs; Les Etablissements de St. Louis; Assizes de Jerusalem; Guizot, Essais sur l'Histoire de France, Ess. 5; Merlin, Rép. Feodalité; Dalloz, Dict. Feodalité.

² The turning over from a former law to a new one or the recognition by the law of a new tenant in substitution for the former one is an attainment. In early times this took place in the presence of the *pares curiæ*. See Bouvier, Law Dict. Attainment; 1 Spence, Eq. Jur. 137.

³ Dunwoodie v. Read, 3 Serg. & R. Penn. 447.

1567. In this country all the lands were vested in the government, and no property in land can be had but where the title was deduced from the crown or the ante-revolutionary governments, or since the revolution and the independence of the United States, from the national or state governments. No foreign nation, and no individual, whether a citizen of the United States or an alien, can make a valid purchase of the Indian title.⁴ The government of the United States has never claimed the Indian lands other than to insist upon a right of pre-emption as to the Indians themselves, and absolute sovereignty as to the rest of mankind.

In the consideration of real property it will be necessary to ascertain the several kinds of such property; the estate which may be had in the same; and the title by which it may be holden.

1568. *Real property* consists of land, and of all rights and profits arising from and annexed to land which are of a permanent and immovable nature. It is usually comprised under the words, lands, tenements, and hereditaments.

1569. *Corporeal hereditaments* include land, emblements, and fixtures. These will be considered in order.

1570. The term *land* comprehends any ground, soil, or earth whatsoever, which is not separated from the earth, as meadows, pastures, woods, waters, marshes, furze, and heath. It has an indefinite extent upward and downward,⁵ so that all mines and treasures which are below the surface belong to the owner of the soil, and its extent upward is indefinite. No man can, therefore, build so as to overhang his house on his neighbor's ground; *cujus est solum, ejus est usque ad cælum*, is the maxim of the common law on the subject.

It is not always easy to ascertain what is land and what may be considered as personal property. The following rules will assist us in our inquiries:

1571. The buildings which are erected upon land are a part of it according to the maxim, *quod solo inædificatur solo cedit*, whatever is built on the soil is an accessory of the soil.⁶ Hence, if a man grant or devise the land without mentioning the buildings, the latter will pass. It is nevertheless prudent and proper to grant or devise it with all the buildings thereon.⁷

But to this general rule there are some exceptions. It is said that a man may have an estate in a chamber or part of a house, and an ejectment will lie for it, and the land and the other part of the house will be considered as a dwelling-house and the chamber another.⁸ Again, a pew in a meeting-house is sometimes considered as real estate.⁹

⁴ *Johnson v. McIntosh*, 8 Wheat. 543; *Cherokee Nation v. Georgia*, 5 Pet. 1; *Worcester v. Georgia*, 6 Pet. 515.

⁵ 1 Inst. 4, a; Wood, Inst. 120; 2 Sharswood, Blackst. Comm. 18; 1 Cruise, Dig. 58; Sheppard, Touchst. 92.

⁶ Inst. 2, 1, 29; Washburn v. Sproat, 16 Mass. 449. The numerous buildings which may be erected on the land, and which are considered as a part of it, have obtained various names. The terms "mansion," "dwelling-house," "house," and "messuage," are in general synonymous. *Doe v. Collins*, 2 Term, 502; 1 Thomas, Coke, Litt. 215, n. 35; but see 9 Barnew. & C. 681, and the cases there cited; see also *Comm. v. Pennock*, 3 Serg. & R. Penn. 199; 1 Leach, 89, 428; 1 East, P. C. c. 15, s. 19; 3 Inst. 64; 1 Hale, 558; 4 Sharswood, Blackst. Comm. 225; 2 East, P. C. 493; 2 Russell, Cr. 14. A "cottage" has nearly the same meaning in law. 1 Thomas, Coke, Litt. 216; Sheppard, Touchst. 94. As to the extent of the word "mill," see 1 Chitty, Pract. 174; Bouvier, Law Dict. *Mill*. A sale of land by the United States will pass the property to the purchaser in a fence, placed on it by mistake. *Seymour v. Watson*, 5 Blackf. Ind. 555.

⁷ Comyn, Dig. *Grant*, 23; Coke, Litt. 4, a; *Isham v. Morgan*, 9 Conn. 374.

⁸ 1 Preston, Est. 214; Coke, Litt. 486; *Loring v. Bacon*, 4 Mass. 575; *Otis v. Smith*, 9 Pick. Mass. 297; *Proprietors v. Lowell*, 1 Metc. Mass. 538; *Cheeseborough v. Green*, 10 Conn. 318; *Doe v. Burt*, 1 Term, 701.

⁹ Bouvier, Law Dict. *Pew*.

But where a building is erected upon the land of another with his permission by one who has no estate in the land, it will be personalty and belong to the builder.¹⁰ This is otherwise if the builder has an interest in the land; as, for example, the husband of a tenant in dower, a reversioner or the like.¹¹

1572. Seeds which have been sown in the earth immediately become a part of the land in which they have been sown: *quæ sata solo cedere intelliguntur*.¹² When, however, they became crops, at any rate if fit for harvest, they may be severed by sale and become personal estate.¹³

1573. Trees and bushes planted by the owner of them in his own land become a part of it as soon as they are planted, whether they have taken root or not; whether they would acquire this new quality if they belonged to another would be more doubtful.

They may be regarded as personalty; as, when planted by a tenant who is a nurseryman for the purpose of transplanting;¹⁴ and they may acquire a character of personalty; as, for example where they are sold to be cut and carried away.¹⁵

Bushes and flowers planted in boxes or pots would not possess the character of land; they would be clearly personal property.

As between the owners of adjoining estates, if the tree be planted near the division line, and the roots grow into the neighboring estate, the tree becomes the joint property of the owners of both the estates; but if the branches only overshadow the adjoining land, and the roots do not enter it, the tree wholly belongs to the estate where the roots grow.¹⁶

1574. Things which are attached to the freehold, though but slightly, when placed there permanently become a part of it.¹⁷

1575. Things which are reputed as making a part of the land continue, even after being detached from it, to make a part of it as long as they are destined or intended to be replaced; as, when millstones were taken out to be picked with an intention of replacing them they retained their quality of real estate.¹⁸ But things which have never been used or made a part of the realty do not acquire the character of land by being simply destined to be used on the land.

1576. Straw which is raised on the land and manure made upon it are considered as a part of it, unless an intention be manifested by the owner that they shall be considered personal estate.¹⁹ But when the manure is not raised in the

¹⁰ Wells v. Bannister, 4 Mass. 514; Doty v. Gorham, 5 Pick. Mass. 487; Ashmun v. Williams, 8 id. 402; Aldrich v. Parsons, 6 N. H. 555; Osgood v. Howard, 6 Me. 452; Russell v. Richards, 10 id. 429.

¹¹ Washburn v. Sproat, 16 Mass. 449; Cooper v. Adams, 6 Cush. Mass. 90; Eastman v. Foster, 8 Metc. Mass. 26.

¹² Inst. 2, 1, 32.

¹³ Evans v. Roberts, 5 Barnew. & C. 829; Jones v. Flint, 10 Ad. & E. 753; Sainsbury v. Matthews, 4 Mees. & W. Exch. 343; see Emerson v. Hulis, 2 Taunt. 38; Stambaugh v. Yates, 2 Rawle, Penn. 161; Craddock v. Riddlesburger, 2 Dan. Ky. 206.

¹⁴ Penton v. Robert, 2 East, 88; Wyndham v. Way, 4 Taunt. 316; Miller v. Baker, 1 Metc. Mass. 27; Whitmarsh v. Walker, 1 id. 313.

¹⁵ Smith v. Surman, 9 Barnew. & C. 561; Claflin v. Carpenter, 4 Metc. Mass. 580; Olmstead v. Niles, 7 N. H. 522.

¹⁶ 1 Swift, Dig. 104; Waterman v. Soper, 1 Ld. Raym. 737; Griffin v. Bixby, 12 N. H. 454. But see Lyman v. Hale, 11 Conn. 177; Holder v. Coates, Mood. & M. 112.

¹⁷ Buller, N. P. 34; Pyle v. Pennock, 2 Watts & S. Penn. 390; 2 Watts. & S. Penn. 116.

¹⁸ Colegrave v. Dios Santos, 2 Barnew. & C. 76; Liford's case, 11 Coke, 50; Goodrich v. Jones, 2 Hill, N. Y. 142; House v. House, 10 Paige, Ch. N. Y. 162; see Farrar v. Stackpole, 6 Me. 154; Rogers v. Gillinger, 30 Penn. St. 185.

¹⁹ Al. 31; Stone v. Proctor, 2 N. Chipm. Vt. 115; Lassel v. Reed, 6 Me. 222; Middlebrook v. Corwin, 15 Wend. N. Y. 169; Goodrich v. Jones, 2 Hill, N. Y. 142; Kittredge v. Woods, 3 N. H. 503; Parsons v. Camp, 11 Conn. 525; Daniels v. Pond, 21 Pick. Mass. 367; Lewis v. Lyman, 22 id. 437.

course of agriculture, as, for example, by a livery-stable keeper, it is considered as personal property.²⁰

1577. Those things which in their nature do not in themselves belong to us, but are ours only because they are found on our land, are considered as making a part of the land; such, for example, are animals, which, being in their perfect natural liberty in a certain place, are considered a part of such place. "If a man hath fish in a pond," say some old authorities, "and die, they go to his heir, for they are considered as the profits thereof, and therefore descend with the pond to the heir."²¹

1578. The fruits and productions of the earth other than emblements, while they are hanging by the roots are a part of the real estate.²² This agrees with the Roman law. Gaius tells us, *Fructus pendentes pars fundi videntur*;²³ and Ulpian, *Fructus perceptos villæ non esse constat*,²⁴ for as soon as they are severed or gathered, they are personal property. An apple hanging where it grew is real estate; if shaken by the wind and blown upon the ground, it is personal. In the first case it descends to the heir, and is not the subject of larceny; in the last, it goes to the executor, and may be stolen.

1579. Things which, though personal in their nature or movable, are constructively attached to the real estate, are considered as real property; the keys of a house, title-deeds, and the box in which they are kept, and heir-looms, are of this kind.²⁵

1580. Water of itself is never considered as land. In its nature it is incapable of being fixed, for, though apparently standing still, it is constantly changing. When it is conveyed, the land covered by it must be granted as so much land covered with water; a simple grant of water would give the grantee only a right to fish in it.²⁶ A grant or devise of a mill and its appurtenances even without the land will carry the whole right of using the water enjoyed by the former owner as requisite to its use and a necessary incident.²⁷

1581. As land extends downward to the centre of the earth, mines and minerals found in it form a part of and pass under the name of land. Unless expressly excepted, mines would be included in a conveyance of land without being expressly named, and so *vice versâ*, by a grant of a mine the surface of the land itself, if livery be made, will pass.²⁸

1582. The word *emblemment* is said to be derived from the old French word *embléer*, to sow wheat. By emblements is meant the crops growing upon the land. Crop here signifies the products of the earth which grow yearly and are raised by annual expense and labor, or "great manurance and industry," such as grain; but not fruits which grow on trees, which are not planted yearly, grass and the like, though they are annual.²⁹

The crops must have been actually planted during the occupancy of the tenant,³⁰ the possession must have been a rightful one on the part of the tenant, the time of termination of the estate must be uncertain, and the termination

²⁰ Daniels v. Pond, 21 Pick. Mass. 367.

²¹ Bacon, Abr. *Executors* (H); Coke, Litt. 8; Wentworth, Ex. 57; Swinburne, Wills 403.

²² Bacon, Abr. *Executors* (H); Wentworth, Ex. 59; Godolphin, Orph. Leg. 122.

²³ Dig. 6, 1, 44.

²⁴ Dig. 19, 1, 17, 1.

²⁵ Sheppard, Touchst. 90; 1 Washburne, Real Prop. 4.

²⁶ 2 Sharswood, Blackst. Comm. 18; Brownl. 142; Coke, Litt. 4.

²⁷ Croke, Jac. 121; Baine v. Chambers, 1 Serg. & R. Penn. 169; Strickler v. Todd, 10 Serg. & R. Penn. 63; Hall v. Benner, 1 Penn. 402.

²⁸ Coke, Litt. 6; 1 Thomas, Coke, Litt. 218; Sheppard, Touchst. 26.

²⁹ Coke, Litt. 55; Comyn, Dig. *Biens*, G. 1; Evans v. Inglehart, 6 Gill & J. Md. 188.

³⁰ 1 Washburne, Real Prop. 103; Stewart v. Doughty, 9 Johns. N. Y. 108; Price v. Pickett, 21 Ala. n. s. 741; Thompson v. Thompson, 6 Munf. Va. 514; Grantham v. Hawley, Hob. 132.

must not be by voluntary act of the tenant. Thus, a tenant at will is entitled to emblements;³¹ one at sufferance is not.³² If the owner of land sells it when a crop is growing, the crop passes unless excepted.³³

1583. A distinction is made between a tenant for life, whose right may terminate at any time by death, and a tenant for years, whose title is to expire at a known period. The tenant for life sows in the hope of reaping; and if his right terminates by his death, justice as well as good policy requires that his executors should enjoy the emblements, that they should reap the crop which he has raised, as it was to the interest of society that the land should not go untilld.³⁴ This right in the tenant for life extends to every case where the estate for life determines by the act of God or the act of law, and not to cases where the estate is ended by the voluntary, wilful, or wrongful act of the tenant himself.³⁵

In general, a tenant for years is not entitled to emblements, because, knowing the time when his lease is to determine, it is his folly to sow where he cannot reap.³⁶ But when this reason does not apply, and his estate may determine by an uncertain event, the rule has no longer any force. When the tenant for years holds under a tenant for life, and the estate terminates by the death of the latter, the former, standing in his place, shall have the emblements.³⁷

In several states of the Union the right to emblements is regulated by statute or by custom, varying from the rules of the common law.

1584. As a general rule, all things which are attached to the freehold, or annexed to the land, become a part of it. But such annexation must have been made with an intention that it should be of a permanent nature and firmly fixed, either by the owner or by a wrong-doer. In many cases annexations are made not possessing these requisites, and they are liable to be removed. They are called *fixtures*.³⁸

Fixtures are personal chattels annexed to land, which may afterward be severed and removed by the party who has annexed them, or his personal representatives, against the will of the owner of the freehold.

The term is frequently and perhaps generally applied to all articles, personal in their general nature, which have been used in connection with the realty, although in technical accuracy the term should be applied only to those which cannot be removed by the party affixing them.³⁹

Not unfrequently questions arise as to whether fixtures shall be considered real estate or part of the freehold, or whether they are to be treated as personal property. To decide these it is proper to consider the mode of annexation;

³¹ *Chandler v. Thurston*, 10 Pick. Mass. 205; *Davis v. Broclebank*, 9 N. H. 73; *Sherburn v. Jones*, 20 Me. 70.

³² *Doe v. Turner*, 7 Mees. & W. Exch. 226.

³³ *Burnside v. Weightman*, 9 Watts, Penn. 46; *Foote v. Colvin*, 3 Johns. N. Y. 216.

³⁴ *Stewart v. Doughty*, 9 Johns. N. Y. 112; 1 Chitty, Pract. 91; Bacon, Abr. *Executors*, H 3.

³⁵ *Oland's case*, 5 Coke, 116; *Bulwer v. Bulwer*, 2 Barnew. & Ald. 470; *Debon v. Titus*, 5 Halst. N. J. 128; *Whitmarsh v. Cutting*, 10 Johns. N. Y. 360; *Chesley v. Welch*, 37 Me. 106.

³⁶ *Kittredge v. Woods*, 3 N. H. 503; *Debow v. Colfax*, 5 Halst. N. J. 128; *Harris v. Carson*, 7 Leigh, Va. 632; *Whitmarsh v. Cutting*, 10 Johns. N. Y. 360; *Chesley v. Welch*, 37 Me. 106.

³⁷ *Coke*, Litt. 56; and see *Bevans v. Briscoe*, 4 Harr. & J. Md. 139; *Davis v. Lyton*, 7 Bingh. 154; *Bulwer v. Bulwer*, 2 Barnew. & Ald. 470.

³⁸ See *Amos & F. Fixtures*; *Viner*, Abr. *Landlord and Tenant*, A; Bacon, Abr. *Executors*, H 3; *Comyn*, Dig. *Biens*, B and C; 2 Chitty, Blackst. Comm. 281, n. 23; *Coke*, Litt. 53, a, and note 5, by Harg.; *Hammond*, Parties, 182; *Am. Jur. No.* 19, p. 53; *Archbold*, L. & T. 859.

³⁹ 1 *Washburn*, Real Prop. 9; *Walker v. Sherman*, 20 Wend. N. Y. 656; *Bishop v. Elliott*, 11 Exch. 113.

the object and customary use of the thing annexed; the character of the contending parties; and the time when they may be removed.

1585. By annexation is understood every mode by which a chattel can be joined or united to the freehold; and whether such annexation is to be considered as making the chattel annexed a part of the freehold or not depends upon circumstances. The following rules will enable us to ascertain whether the annexations form a part of the real estate or whether they are fixtures which can be removed.

When things are so affixed to a building that they are to remain there perpetually they make a part of it; *secus* if they are placed there only for a time.⁴⁰

When the things are so attached to a building that they cannot be detached without breaking something they are presumed to be there as permanent, and they make a part of the freehold; as locks, iron stoves set in brick-work, posts and window blinds built in the wall.⁴¹ When not fastened or let into the soil, but merely laid upon the ground, such a chattel will not make a part of the realty.⁴²

Things which serve to complete a house, although they are not attached to it, are a part of the realty; as, for example, the keys and padlocks used for fastening it, and movable shutters, which are taken down in the morning and put up at night, to fasten a storehouse.⁴³

1586. When a chattel is annexed to the freehold the general rule is that it becomes a part of it.⁴⁴ But to this there are several exceptions. These are:

When there is a manifest intention to use the fixtures in some employment distinct from that of the occupier of real estate.⁴⁵

When the chattel has been annexed for the purpose of carrying on trade it is not in general considered a part of the realty; the fact that it was put up for this purpose indicates an intention that the annexation should not be permanent.⁴⁶ But if there was a clear intention that the chattel should be annexed to the realty, its being used for the purposes of trade would not bring the case within one of the exceptions.⁴⁷

1587. There is a difference as to what fixtures may or may not be removed, as the parties stand in one relation or another. These classes will be separately considered.

* Voorhis v. Freeman, 2 Watts & S. Penn. 116; Oves v. Ogelsby, 7 Watts, Penn. 106; Bacon, Abr. *Executors*, H 3; Hays v. Doane, 3 Stockt. N. J. 24; Laffin v. Griffiths, 35 Barb. N. Y. 58; see Ford v. Cobb, 20 N. Y. 844.

⁴⁰ McDaniel v. Moody, 4 Ala. 314. But see Goddard v. Chase, 7 Mass. 432; Union Bank v. Emerson, 15 Mass. 159; Pyle v. Pennock, 2 Watts & S. Penn. 390; Voorhis v. Freeman, 2 Watts & S. Penn. 116; Despatch line v. Bellamy Man. Co. 12 N. H. 205; permanent fences, Glidden v. Bennett, 43 N. H. 306; Smith v. Carroll, 4 Greene, Iowa, 146; buildings, Burnside v. Twichell, 43 N. H. 390; see Keogh v. Daniel, 12 Wisc. 163; Higgins v. Riddell, 12 id. 187.

⁴¹ Buller N. P. 34; Elwes v. Maw, 3 East, 38; Horn v. Baker, 9 East, 215. See Beckwith T. Boyce, 9 Mo. 560.

⁴² And the things so annexed will pass even though temporarily removed, as, for instance, for repairs. Wadleigh v. Janvrin, 41 N. H. 503.

⁴³ English v. Foote, 16 Miss. 444.

⁴⁴ Crane v. Brigham, 3 Stockt. N. J. 29.

⁴⁵ Leman v. Miles, 4 Watts, Penn. 330; Taffe v. Warwick, 3 Blackf. Ind. 111; Bartlett v. Wood, 32 Vt. 372; Kelsey v. Durkee, 33 Barb. N. Y. 410; Wade v. Johnston, 25 Ga. 331.

⁴⁶ Fitzherbert v. Shaw, 1 H. Blackst. 260; Van Ness v. Packard, 2 Pet. 137; Hunt v. Mullanphy, 1 Mo. 620; Powell v. Monson, 3 Mas. C. C. 459; Sparks v. State Bank, 7 Blackf. Ind. 469; Winslow v. Merchants' Ins. Co. 4 Metc. Mass. 306; Sands v. Pfeifer, 10 Cal. 258; Noble v. Bosworth, 19 Pick. Mass. 314. And the general rule in the United States is to disregard the question of utility for purposes of trade, and inquire into the question of applicability to the general purposes for which the premises are used. Harris v. Haynes, 34 Vt. 220; Whiting v. Brastow, 4 Pick. Mass. 310; 1 Washburn, Real Prop. 9. See Hill v. Wentworth, 28 Vt. 428.

1588. When the owner of an estate dies, it sometimes becomes a question whether things annexed shall descend to the heir with the realty or pass to the executor as personal property. In England the rule that the annexation turns the chattel into realty is the most rigid as between these persons, and the heir will in general take the thing annexed as a part of his estate.⁴⁸ In this country the rule is of little practical importance, because the real and personal property of the deceased is generally subject to precisely the same appropriation, either for the benefit of creditors or next of kin. Still, there may be frequent occasion for the application of the rule; as, for example, when a testator devises all his real estate to one or more devisees and bequeaths his personal to another person.⁴⁹

Though the general rule is that the chattel annexed shall be considered as realty, yet, if the ancestor manifested an intention, which is to be inferred from circumstances, that the things affixed should be considered as personalty, they will be so treated, and will belong to the executor.⁵⁰

1589. On a devise of the real estate, things permanently annexed to the realty at the time of the testator's death will pass to the devisee. He has the same rights as to fixtures as a vendee.⁵¹

1590. Between tenants for life, or their executors, and the remainderman or reversioner the law is liberal, and the executors of such tenant will be entitled to remove all fixtures put up by him. He has the same rights as a tenant for years, and it has accordingly been held that steam engines erected in a colliery by a tenant for life belonged to the executor and not to the remainderman.⁵²

1591. The rule that chattels annexed to the freehold become a part of it is as strict between the vendor and vendee as between the executor and the heir.⁵³ Fixtures erected by the vendor for the purpose of trade, as potash kettles for manufacturing ashes,⁵⁴ or dye kettles used in dyeing,⁵⁵ pass to the vendee of the land.

Between the mortgagor and mortgagee the rule is the same as between the vendor and vendee.⁵⁶ And the rule is the same between a mortgagee and the vendee of the mortgagor.⁵⁷

1592. Between landlord and tenant the ancient rule of annexation has been much relaxed in favor of the tenant for the purpose of promoting trade and agriculture, and the right of removing fixtures by the tenant is the most extensive. The right to remove erections made by himself extends to the following cases:

He may remove implements of trade; as, for instance, furnaces or vats and coppers of a soap boiler, or a kettle and boiler in a tannery put up with brick and mortar, or stills set up in a furnace for making whisky.⁵⁸

Machinery; as, a steam engine.⁵⁹

⁴⁸ *Farrar v. Stackpole*, 6 Me. 157; *Walker v. Sherman*, 20 Wend. N. Y. 636; *Teaff v. Hewitt*, 1 Ohio St. 511; *Buckley v. Buckley*, 11 Barb. N. Y. 43.

⁴⁹ *Bacon, Abr. Waste*, C.

⁵⁰ *Bacon, Abr. Executors*, H 3. See *House v. House*, 10 Paige, Ch. N. Y. 158; *Fay v. Mussey*, 13 Gray, Mass. 56.

⁵¹ 2 *Barnew. & C.* 80.

⁵² *Lawton v. Lawton*, 3 Atk. Ch. 13.

⁵³ *Despatch Line v. Bellamy Man. Co.* 12 N. H. 205; *Preston v. Briggs*, 16 Vt. 124; *Miller v. Plumb*, 6 Cow. N. Y. 665.

⁵⁴ *Miller v. Plumb*, 6 Cow. N. Y. 663.

⁵⁵ *Noble v. Bosworth*, 19 Pick. Mass. 314.

⁵⁶ *Amos & F. Fixt.* 188; *Preston v. Briggs*, 16 Vt. 124; *Despatch Line v. Bellamy Man. Co.* 12 N. H. 205; 15 Mass. 159; *Crane v. Brigham*, 3 Stockt. N. J. 29.

⁵⁷ *Harris v. Haynes*, 34 Vt. 220.

⁵⁸ *Van Ness v. Packard*, 2 Pet. 137; *Cresson v. Stout*, 17 Johns. N. Y. 116; *Lemar v. Miles*, 4 Watts, Penn. 330; *Union Bank v. Emerson*, 15 Mass. 159.

⁵⁹ *Swift v. Thompson*, 9 Conn. 63; *Sturgis v. Warren*, 11 Vt. 433. But see *King v. Johnson*, 7 Gray, Mass. 239.

Buildings erected for the purposes of trade. The tenant who erects these may remove them, though the trade be of an agricultural nature.⁶⁰ When the thing annexed is put up for the purposes of trade, and also with an intent to obtain greater profits of the land, as, cider mills, or machinery for working mines and the like, the right of removal will perhaps depend upon the fact whether the primary object of annexation was or was not trade.

The tenant may also remove articles annexed for ornament or domestic use, unless by so doing he cannot leave the estate in as good a condition as when he took it.⁶¹ Shrubs and trees on land leased as a nursery are personal chattels, as between the landlord and his tenants, and the tenant may therefore remove them;⁶² but he cannot plough up strawberry beds in full bearing, though he purchased them of a previous tenant.⁶³

There seems to be no good reason why the same privilege of removing fixtures should not be allowed in a case between a landlord and tenant at will.⁶⁴

1593. In regard to the time when the fixtures must be removed, a distinction must be observed between a tenant for years and a tenant for life. The first has a known and definite time in the estate, and he is therefore required to perform every act in relation to the estate during the time he has possession. When he has placed fixtures upon the premises which he intends to remove, he must take care that they are removed while he is in possession. He may, however, remove them at any time before he gives up or surrenders the premises, although his lease may have expired, and he is holding over, that is, keeping possession of the premises, without the consent of the landlord, after the term of his lease has expired.⁶⁵ But if he surrenders the lease without reservation, he thereby relinquishes all his rights to the fixtures.⁶⁶

The rule with regard to tenants for life does not apply to tenants for years or tenants at will, because the time when their estates ceased is uncertain. They may, therefore, upon the determination of their estates, not occasioned by their own faults, have a reasonable time within which to remove the fixtures. Hence their right to bring an action for them.⁶⁷ In case of their death the right passes to their representatives.

1594. *Tenement*, in its most extensive signification, comprehends everything which may be holden, provided it be of a permanent nature; and not only lands and inheritances which are holden, but also rents and profits *à prendre* of which a man has a frank tenement, and of which he may be seized *ut de libero tenemento*, are included under this term.⁶⁸ But the word *tenement*, without other circumstances, has never been construed to pass a fee.⁶⁹ In its most confined and vulgar acceptation, it means a house or building.⁷⁰

1595. The word *hereditaments*,⁷¹ more extensive in its signification than land

⁶⁰ *White v. Arndt*, 1 Whart. Penn. 94; *Van Ness v. Packard*, 2 Pet. 137.

⁶¹ *Hays v. Doane*, 3 Stockt. N. J. 24; *Vaughen v. Haldeman*, 33 Penn St. 522; *Cohen v. Kyler*, 27 Mo. 122; *Wall v. Hinds*, 4 Gray, Mass. 256; see *Main v. Schwarzwaelder*, 4 E. D. Smith, N. Y. 373; *Blethen v. Towle*, 40 Me. 310.

⁶² *Miller v. Baker*, 1 Metc. Mass. 27.

⁶³ *Watherell v. Howells*, 1 Campb. 227; *Empson v. Soden*, 4 Barnew. & Ald. 655.

⁶⁴ *Doty v. Gorham*, 5 Pick Mass. 487; *Whiting v. Brastow*, 4 *id.* 310.

⁶⁵ 1 Barnew. & C. 79. See *Taylor v. Townsend*, 8 Mass. 411; *Washburn v. Sproat*, 16 Mass. 449; *Moore v. Smith*, 24 Ill. 512.

⁶⁶ *Shepard v. Spaulding*, 4 Metc. Mass. 416; *Davis v. Moss*, 38 Penn. St. 346; *McCracken v. Hall*, 7 Ind. 30.

⁶⁷ *Lawton v. Lawton*, 3 Atk. Ch. 13.

⁶⁸ *Coke*, Litt. 6 a; 1 *Thomas*, *Coke*, Litt. 219; *Perkins*, Conv. s. 114; 2 *Sharswood*, *Blackst. Comm.* 17.

⁶⁹ 10 *Wheat*. 204.

⁷⁰ 1 *Preston*, Est. 8.

⁷¹ See *Sheppard Touchst.* 91; *Cruise*, Dig. tit. 1, s. 1; *Wood*, Inst. 221; *Dane*, Abr. *Index*, h. t.; 1 *Chitty*, Pract. 203-229.

or tenements, signifies anything capable of being inherited, be it corporeal or incorporeal, real, personal, or mixed, and includes not only lands and everything thereon, but also heirlooms and certain furniture, which by custom descends to the heir together with the land.⁷² By this term such things are denoted as may be the subject matter of the inheritance but not the inheritance itself; it cannot, therefore, by its own intrinsic force, enlarge a life estate into a fee.⁷³

1596. Hereditaments are divided into corporeal and incorporeal. The corporeal hereditaments are confined to lands and things immovably attached thereto; they have already been considered in this chapter. In the next chapter the law relating to incorporeal hereditaments will be examined.

⁷² Coke, Litt. 5 b; 1 Thomas, Coke, Litt. 219; 2 Sharswood, Blackst. Comm. 17.

⁷³ 2 Bos. & P. 251; Doe v. Allen, 8 Term, 503; 1 Thomas, Coke, Litt. 219, note T.

CHAPTER XVI.

EASEMENTS AND PROFITS À PRENDRE

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1597. *Incorporeal real property* is a right issuing out of, or annexed to, a thing corporeal. It is so called because it has no corpus, and is not tangible nor visible. It is not the object of the senses, but exists only in idea and in contemplation of law. Although it is thus unsubstantial, it may produce something substantial and beneficial to the owner. Corporeal property, as has already been observed, is in the land itself; the incorporeal is merely the right to have some part only of the produce or benefit of the corporeal property, or to exercise a right, or have an easement, or privilege, or advantage over or out of it.

1598. An incorporeal hereditament may be granted to another in two ways in respect to the tenure of the right. It may be granted to be enjoyed in an individual or personal capacity; as, where a right of common or right of way is granted to A, or to A and his heirs, or to the inhabitants of a certain village, or to any other class of individuals. Or it may be granted to the owners or owner of a certain corporeal hereditament; as a right of way to the owners of Blackacre over Whiteacre, or a right of common to the freeholders of Camp-town. In the former case it is said to be a right in gross; in the latter a right appendant or appurtenant, as the case may be.

1599. A marked difference exists in the transfer of corporeal and incorporeal property. The possession of corporeal property, as houses and lands, is capable of actual and visible delivery or transfer, and for this reason it is said to lie in livery, that is, delivery of seisin or possession. Incorporeal property, on the other hand, is incapable of actual possession, and passes by mere deed of grant, or such other conveyance as amounts to a grant, and it is, therefore, said to lie in grant.¹

1600. According to Blackstone, there are in the English law ten kinds of incorporeal hereditaments—a number which our institutions have much abridged. Happily we have no advowsons, tythes, dignities, hereditary offices, nor corodies. Some others, which are not classed under this head by the old English lawyers, will here be considered as incorporeal inheritances. These will be considered under five different heads: easements, profits à prendre, rent, annuities, and franchises.

1601. The most numerous class of incorporeal hereditaments form what is called *easements*. An easement is a right in the owner of one parcel of land, by reason of such ownership, to use the land of another for a special purpose not inconsistent with a general property in the owner. The existence of the easement may materially injure or depreciate the pecuniary value of the estate

¹ Coke, Litt. 9, 172; Comyn, Dig. *Grant*. An incorporeal hereditament will pass by other conveyances than mere grants, as by bargain and sale. Croke, Eliz. 166; covenants to stand seised, and by lease and release. See 2 Sharswood, Blackst. Comm. 317.

over which it exists, but must not be inconsistent with the ownership of such estate. No easement can exist when the two estates belong to the same person: *nulli enim res sua servit jure servitutis*.²

An easement is very similar to the servitude of the civil law; it is, however, not so extensive in its signification. A servitude comprehends, in addition to the easement of the common law, many rights which in the latter fall under the division of *profits à prendre*.³

There is also the consideration which is sometimes overlooked, yet which becomes in many cases of considerable importance, that in the civil law consideration is given more prominently to the burden (*servitus*) imposed upon the servient estate, while in the common law it is regarded rather in the nature of a right established or to be adjudicated upon, attached to the dominant estate. In matters relating to the acquisition and continuance of these rights, the distinction becomes of importance, and renders a reference to the civil law to ascertain the doctrine which should prevail at common law liable to mislead.

The estate which is entitled to the easement is called the dominant estate, and the estate which owes it is denominated the servient estate.

This subject naturally divides itself into the requisites of an easement, the kinds of easements, and the manner of extinguishing them.

1602. *The principal requisites of easements* are: that they be imposed upon corporeal real property; that they be for the benefit of corporeal real property; and that there be two distinct estates, the dominant and the servient.

1603. To constitute an easement it is necessary that the right should be one to use corporeal real estate. It must attach to the soil of the servient estate, either in the way of a positive exercise of right or a negative, in preventing the owner from making a use which will disturb the owner of the easement in his right. Any corporeal real property may in general be made subject to an easement. The obligation resting upon the owner of the servient estate applies to him in that character, and passes with the estate to the new owner, so that if any disturbance of the easement has taken place previous to the transfer, although such tortious act would give a right of action to the owner of the easement against such former proprietor, yet his successor will be responsible if he allows such disturbance to continue.⁴

This obligation, in the absence of agreement, is simply one of non-interference with the right of the dominant estate.⁵

1604. The right must be annexed to some corporeal real estate to come within the strict meaning of the term easement. When personal rights, which in their mode of enjoyment bear a strong resemblance to easements, are conferred by grant or otherwise acquired, independently of the possession of any tenement by the grantee, they give a right of action for the disturbance, but are not possessed of all the incidents of easements. Some of them, however, as rights of way, are so closely analogous thereto as to be more conveniently treated of in this connection than any other, and accordingly will be here considered.

² Dig. 8, 2, 26; *Grant v. Chase*, 17 Mass. 443.

³ Hammond, Nisi P. 172. *Profits à prendre* are those taken and enjoyed by the proprietor himself; *profits à rendre* are those which are received at the hands of and rendered by another. A *profit à prendre* consists in a right to take the soil or the produce of land or a part of it which has a supposable value, and in this respect differs from the easement, which is at most a right to use. So too, for illustration, there may be an easement consisting of a right to enter upon land and draw water, but not of a right to enter upon another's land to fish in waters and take fish therefrom. 2 Washburn, Real Prop. 26; *Manning v. Wasdale*, 5 Ad. & E. 758; *Gateward's case*, 6 Coke, 60; *Waters v. Lilley*, 4 Pick. Mass. 45.

⁴ *Penruddock's case*, 5 Coke, 101.

⁵ *Taylor v. Whitehead*, 2 Dougl. 749. See *Bullard v. Harrison*, 4 Maule & S. 387; *Pomfret v. Ricroft*, 1 Saund. 322.

1605. The dominant estate must belong to one person and the servient to another. There must be a right attached to the estate of one person over the land of another.

On the title to both being united in one individual or set of individuals, the easement becomes extinguished; it is immediately merged in the higher estate.⁶ But in this case the owner must have a valid title to the dominant estate in order to create an extinguishment by a unity of possession.⁷ And where the accommodation continues during the union, it may revive as an easement on the severance.⁸

As the rights are not personal and do not change with the ownership of the estates, it is very common to speak of the estates themselves as enjoying the right or owing the duty. The faculty of using an easement, considered alone, and separated from the dominant estate, cannot be sold nor hired nor given. He who has a just title to the dominant estate has alone the right of using the easement, without being able to confer his right to other possessors of another estate, or even to extend the right to other estates owned by himself.⁹ When the owner of the dominant estate sells a part of it to another, the purchaser will be entitled to use it as far as his estate extends, as well as the seller.¹⁰

1606. Easements arise in a variety of ways: from the relative situation of the dominant and servient lands; by force of law; or by the agreement of parties.

1607. The relative situation of one parcel of land to another may give rise to certain rights merely as a result from such situation. These rights may be properly termed *natural easements*, since they result from the natural relation which the several premises bear to each other. They are classified as easements of rain water, of springs, and of water courses.

1608. There is no *easement of water* which requires the owner of one parcel of land to receive the water which falls upon the surface of another parcel, and which does not regularly flow in a defined channel. In the absence of agreement the owner of one estate may raise the surface, or may put such erections thereon as he chooses, even though the effect may be to cause an accumulation of rain water, or water from springs, bogs, etc., upon his neighbor's land.¹¹ In the same manner the owner of the superior estate may make such use of his estate as he may desire without reference to its effect upon the estate of his neighbor.¹²

1609. The owner of the land is entitled to all the advantages which arise from it. When a *spring* of water is found on his land he may use it, as he does any other property which is the produce of his estate, without regard to the convenience or advantage of his neighbors. This right is very different

⁶ *Holmes v. Goring*, 2 Bingh. 83; 9 J. B. Moore, 166; *Grant v. Chase*, 17 Mass. 443; *Wolfe v. Frost*, 4 Sandf. Ch. N. Y. 71, 89; *Seymour v. Lewis*, 13 N. J. 450.

⁷ *Thomas v. Thomas*, 2 Crompt. M. & R. Exch. 41; *Pearce v. McClenaghan*, 5 Rich. So. C. 178; *Binney v. Hull*, 5 Pick. Mass. 503; *Tyler v. Hammond*, 11 id. 193.

⁸ *Dunklee v. Wilton* R. R. 24 N. H. 489; *Grant v. Chase*, 17 Mass. 443; *Seibert v. Levan*, 8 Penn. St. 383.

⁹ *Kirkham v. Sharp*, 1 Whart. Penn. 323; *Road from Lazaretto*, 1 Ashm. Penn. 417; *Lewis v. Carstairs*, 6 Whart. Penn. 198.

¹⁰ *Watson v. Bioren*, 1 Serg. & R. Penn. 227; *Underwood v. Carney*, 1 Cush. Mass. 285; *Whitney v. Lee*, 1 All. Mass. 198. See *Washburn, Easements*, 183; *Henning v. Burnet*, 8 Exch. 187; *South Metropolitan, etc., v. Eden*, 16 C. B. 42; *Allan v. Gomme*, 11 Ad. & E. 759.

¹¹ *Chasemore v. Richards*, 2 Hurlst. & N. Exch. 168, 5 id. 982; *Broadbent v. Ramsbottom*, 11 Exch. 602; *Wheatley v. Baugh*, 25 Penn. St. 528; *Cooke v. Hull*, 3 Pick. Mass. 269; *Parks v. Newburyport*, 10 Gray, Mass. 28; *Flagg v. Worcester*, 13 id. 601; *Dickinson v. Worcester*, 7 All. Mass. 19; *Gannon v. Hargadon*, 10 id. 106.

¹² *Broadbent v. Ramsbottom*, 11 Exch. 602.

from the right of the owner of an estate through which a water course flows.

This, however, is not the case where the overflow has established a defined and constant channel, as in that case the rule applicable to running streams applies.¹³

The right to use and control subterranean water is determined upon the same principles as that to surface water. When the water percolates through the ground without forming well-defined channels, the owner of each estate may use the same, as by sinking wells or pits, or do any acts upon his estate, as draining, excavating for quarrying, without regard to its effect upon his neighbor's estate.¹⁴ It has even been held that the owner of an estate may take measures expressly to prevent water from percolating from his land to his neighbor's;¹⁵ and this decision, though questioned, has not been expressly denied.¹⁶

Where there is a defined channel underground which can be distinguished and ascertained, it is said that rights may be acquired by priority of use, as in natural channels above ground.¹⁷ It seems, however, that this does not apply to wells fed by springs except under very peculiar circumstances.¹⁸

An estate on which there is a spring may, however, be subject to an easement; that is, the owner of another may have a right to draw water there, or water his cattle. But this is not a natural easement; it is one which must arise from a grant or prescription.

1610. It will be well to observe a distinction which exists in *easements* of which *running water* is the subject. The right to receive a flow of water and to transmit it in its accustomed course may be called a natural easement. The right to interfere with an accustomed course, either by damming it and forcing it upon the land above, or transmitting it, altered in quality or quantity, to the inferior inheritance, may be called an artificial easement.

These natural easements appear in some degree to partake of the character of rights of property, and it has been asserted that, inasmuch as the flow cannot be claimed as water, but as land, the water is therefore identified with the realty.¹⁹ But it must be recollected that the easement does not consist in the right to the fluid, but in the current.²⁰ It is the right to receive the current from the superior estate, and the obligation to transmit it to the inferior, which makes the natural easement.

1611. By water course is usually understood the flow or movement of water in rivers, creeks, and other streams, above ground. In the examination of the subject it will be proper to consider the rights of the owner of the superior

¹³ *Dudden v. Guardians, etc.*, 1 Hurlst. & N. Exch. 627; *Earl v. Dehart*, 1 Beasl. Ch. N. J. 280; *Wheatley v. Baugh*, 25 Penn. St. 528; *Kauffman v. Griesemer*, 26 *id.* 407; *Arnold v. Foot*, 12 Wend. N. Y. 330; *Laumier v. Francis* 23 Mo. 181.

¹⁴ *Actur v. Bluendell*, 12 Mees. & W. Exch. 336; *Chasemore v. Richards*, 2 Hurlst. & N. Exch. 168; 5 *id.* 982; 7 Hou. L. Cas. 349; *Dudden v. Guardians*, 1 Hurlst. & N. Exch. 630; *Smith v. Kendrick*, 7 C. B. 515; *Greenleaf v. Francis*, 18 Pick. Mass. 117; *New Albany R. R. v. Peterson*, 14 Ind. 112; *Roath v. Driscoll*, 20 Conn. 533; *Brown v. Illins*, 25 *id.* 583; *Ellis v. Duncan*, 21 Barb. N. Y. 230; *Wheatley v. Baugh*, 25 Penn. St. 528.

¹⁵ *Chatfield v. Wilson*, 28 Vt. 49; 31 Vt. 358.

¹⁶ See *Roath v. Driscoll*, 20 Conn. 533.

¹⁷ *Dudden v. Guardians*, 1 Hurlst. & N. Exch. 630; *Dickinson v. Grand Junction Co.* 7 Exch. 301; *Smith v. Adams*, 6 Paige Ch. N. Y. 435.

¹⁸ *Actur v. Bluendell*, 12 Mees. & W. Exch. 336; *Chasemore v. Richards*, 2 Hurlst. & N. Exch. 168; 5 *id.* 982; *Roath v. Driscoll*, 20 Conn. 533; *Greenleaf v. Francis*, 18 Pick. Mass. 117; *New Albany R. R. v. Peterson*, 14 Ind. 112; *Wheatley v. Baugh*, 25 Penn. St. 528. See *Smith v. Adams*, 6 Paige Ch. N. Y. 435; *Whetstone v. Bowser*, 29 Penn. St. 59; *Parker v. Boston and Maine R. R.*, 3 Cush. Mass. 107.

¹⁹ *Angell, Water Courses*, 57.

²⁰ 2 Washburn, *Real Prop.* 63.

estate; the rights of the proprietor of the inferior inheritance; and the rights of riparian owners.

1612. The *right to a water course* is not a right to the fluid itself so much as a right to the current of the stream. This right is not acquired by grant or prescription, it begins *ex jure naturæ*; the water having taken a certain course naturally cannot be diverted.²¹ *Aqua currit et debet currere* is the language of the law.²²

The only property which the owner of the superior estate has in the water is the temporary use of it.²³ It may be safely laid down as a general rule that the owner of the superior estate may use the water as he pleases, provided he does not prejudice the other proprietors above and below him.²⁴ Though he may use the water while it runs over his lands, he cannot unreasonably detain it or give it another direction, and he must return it to its ordinary channel when it leaves his estate. Without the consent of the inferior proprietor he cannot divert or diminish the quantity of the water which would otherwise descend to the proprietor below. But this will not deprive him of such a reasonable use of it, by watering his cattle or for domestic purposes, as he may need, for such use would not very perceptibly diminish the ordinary flow of the river.²⁵ Nor can the proprietor so use the water as to run it back on the owner of the estate above him. He cannot alter the level of the water, either where it enters or where it leaves his property.²⁶

The right in this case is hardly an easement, but rather one of the elements of estate, as may perhaps be better shown by considering that the owners of successive estates may erect dams and apply the power thus obtained to mechanical uses, with the limitation that where the fall between two estates is only sufficient for one power, the first occupant merely by such priority is entitled to the undisturbed exercise of his right. Such an appropriation would not give any right to flow back the water upon a superior estate or divert it from an estate below; and the exercise of this right of flowage or withdrawal could only be justified as an easement acquired either by grant or prescription, or under statutory provisions, while the right of erection and use of dam and power requires no grant or prescription.²⁷

²¹ *Shurry v. Piggot*, Bulstr. 339.

²² *McCalmont v. Whitaker*, 3 Rawle, Penn. 84, 88; 9 Coke, 57, b; *Merritt v. Parker*, 1 Coxe, N. J. 460.

²³ *Williams v. Moreland*, 2 Barnew. & C. 910.

²⁴ *Whittier v. Cocheco Man. Co.*, 9 N. H. 454.

²⁵ *Bealy v. Shaw*, 6 East, 206; *Crooker v. Bragg*, 10 Wend. N. Y. 260; *Palmer v. Mulligan*, 3 Caines, N. Y. 315; *Miller v. Miller*, 9 Penn. St. 74; *Wright v. Howard*, 1 Sim. & S. Ch. 190; *Mason v. Hill*, 3 Barnew. & Ald. 304. The question in this case is one of reasonable use. Thus a superior estate may divert reasonable quantities of water, having reference to the nature of the soil and the situation for purposes of irrigation and other domestic and agricultural purposes. *Mason v. Hill*, 5 Barnew. & Ad. 1; *Sampson v. Hoddinot*, 1 C. B. N. s. 590; *Wood v. Wand*, 3 Exch. 748; *Embrey v. Owen*, 6 id. 353; *Webb v. Portland Co.* 3 Sumn. C. C. 189; *Tyler v. Wilkinson*, 4 Mas. C. C. 397; *Blanchard v. Baker*, 8 Me. 253; *Weston v. Alden*, 8 Mass. 136. And for this purpose, in the United States, he may cut sluices to divert the water, even though the amount of the flow is thereby somewhat diminished. The law in this respect is otherwise in England. *Weston v. Alden*, 8 Mass. 136; *Elliott v. Fitchburg R. R.* 10 Cush. Mass. 91; *Cooke v. Hull*, 3 Pick. Mass. 269; *Embrey v. Owen*, 6 Exch. 357. He may not, however, erect a dam to divert the water even for this purpose. *Anthony v. Lapham*, 5 Pick. Mass. 75; *Colburn v. Richards*, 13 Mass. 420; *Sampson v. Hoddinot*, 1 C. B. N. s. 590.

²⁶ 9 Coke, 59; *McCalmont v. Whitaker*, 3 Rawle, Penn. 84; *Norton v. Valentine*, 14 Vt. 239; *Hendricks v. Johnston*, 15 Ala. 472; *Webster v. Fleming*, 2 Humphr. Tenn. 518; *Evans v. Merriweather*, 4 Ill. 402.

²⁷ 2 Washburn, Real Prop. 63-66; Washburn, Easements; Angell, Water C. §§ 130, 135; *Wiggins v. Juge*, 7 Bingh. 682; *Williams v. Morland*, 2 Barnew. & C. 910; *Frankum v. Falmouth*, 6 Carr. & P. 529; *Carey v. Daniels*, 8 Metc. Mass. 466; *McCalmont v. Whita-*

1613. *The rights of the owner of the inferior estate* are, to have the whole current, without diminution or alteration, to flow on his land in its accustomed channel,²⁸ although a less quantity might serve him in all his necessary purposes.²⁹

The inferior inheritance is bound to receive the water, and the proprietor cannot erect any dam or other buildings to prevent it from flowing upon his estate, and by that means force it back upon the dominant property.

The right of a mill owner to discharge water by the natural channel over a lower proprietor's land extends also to a right to enter upon such land so far as necessary for the purpose of removing obstructions.³⁰

This right, it will be borne in mind, is limited to water flowing in natural channels, and where the water course is through an artificial one, it may be cut off by the owner of the source of supply, even though it may have been used for more than twenty years by the inferior owner.³¹

1614. By *riparian proprietors* the civilians mean the owners of land bounding upon a water course. This convenient term has been adopted by the courts and writers on American law.³²

When there is a riparian owner on one side of the stream and another on the other, each owns that portion of the bed of the river (not navigable) which is adjoining his land, *usque ad fitem aquæ*, or, in other words, to the thread or central line of the stream.³³ If hydraulic works are erected by one of them, he has the right to use one-half of the stream, for the opposite owner has the same right to erect such works on his side, and each has an equal right to use the water.³⁴ But still the water can be used by each only as an entire stream in its natural channel, for it would be impossible to make a severance of it.³⁵

In case, however, that owing to a natural cause the water could be separated, as if an island were to arise in the river so as to give one riparian owner one-fourth of the remaining water and three-fourths to the other, the latter would have a right to use the water on his side, but he would not be allowed to construct hydraulic works, a dam, for example, beyond the thread of the stream.³⁶

1614, a. A similar natural easement, that is, one which results as an incident of situation, is that of the *right of lateral support* of land. No man may dig so near the land of another that the other's land shall fall into the pit by its own

ker, 3 Rawle, Penn. 84; *Platt v. Johnson*, 15 Johns. N. Y. 213. It is not within the scope of this work to give even a synopsis of the mill acts of the various states. They may be found collected in the excellent work of Professor Washburn on Easements. The general scope of such acts is to provide for the exercise of rights of flowage by a proprietor upon lands above, and prescribe a mode of assessing damages therefor which supersedes the common law remedy for the trespass and injury done. See *Stowell v. Flagg*, 11 Mass. 364; *Waddy v. Johnson*, 5 Ired. No. C. 333; *Hendricks v. Johnson*, 11 Ala. 472.

²⁸ 6 East, 206; *Hoy v. Sterrett*, 2 Watts, Penn. 329; *Merritt v. Parker, Cox*, N. J. 460; *Pugh v. Wheeler*, 2 Dev. & B. No. C. 50; *Twiss v. Baldwin*, 9 Conn. 291.

²⁹ *Miller v. Miller*, 9 Penn. St. 74.

³⁰ Washburn, Easements, 226; *Prescott v. White*, 21 Pick. Mass. 341; *Prescott v. Williams*, 5 Metc. Mass. 429.

³¹ *Arkmight v. Gell*, 5 Mees. & W. Exch. 203; *Wood v. Waud*, 3 Exch. 748; *Greatrex v. Hayward*, 8 *id.* 291.

³² *Tyler v. Wilkinson*, 4 Mas. C. C. 397; 3 Kent. Comm. 440, 4th ed.; Angell, Wat. Courses, 3; Bouvier, Law Dict. *Riparian Proprietors*.

³³ 3 Caines, N. Y. 319; Kames, Eq. part 1, c. 1, s. 1.

³⁴ *Arthur v. Case*, 1 Paige, Ch. N. Y. 448.

³⁵ *Vandenbergh v. Van Bergen*, 13 Johns. N. Y. 212.

³⁶ 10 Wend. N. Y. 260. For this case also statutory provisions exist in many of the states. Angell, Water C. § 483. The right to so control and regulate the use of water courses is founded not upon the exercise of eminent domain, but rather as a part of the *jus publicum*, and the owners of lands take them subject to this general right to regulate their use for the public benefit. See *Commonwealth v. Alger*, 7 Cush. Mass. 97; *Johnson v. Jordan*, 2 Metc. 234.

natural weight.³⁷ But there is no such claim to the support of any additional weight or structure placed thereon, and any injury caused to a building by excavation of the adjoining soil, prosecuted with reasonable care and skill, gives no cause of action;³⁸ and the better opinion seems to be that the fact that the house is an ancient one will not change the rule of law in this respect,³⁹ and certainly no right will be gained where the enjoyment is not apparent.⁴⁰

1614, b. There is a class of servitudes in the civil law which are considered by force of law to arise from the acts of the owner of an estate in establishing an enjoyment or advantage, while it is his own, in favor of one part of the estate, which is considered to subject the other portions to a corresponding burden upon his parting with his land in different parcels to different owners, and it is convenient to consider here how far similar rights are recognized at common law. The question is, in many cases, one of extreme niceness, and the law cannot be considered as well established in many respects. In the French law the principle governing these cases is that known as the *destination du pere de famille*, whereby the owner of a heritage imposes servitudes upon the portions which pass by inheritance; and the principle is extended, as stated, to cases where different parcels of one estate are sold to different owners.

It is undoubtedly true that the French law carries the rule of subjection and addition much farther than the common law, and it may well be doubted whether some of the decided cases both in English and American courts will not be found to have imported more of its regulations than a due regard for the established principles of the common law will warrant.

The better rule appears to be that no easements will pass under the ordinary forms of conveyance, in consequence of the use of them in connection with a portion of the estate, unless they are open and visible, and necessary to the use of the estate.⁴¹ This necessity does not exist when a substitute can be provided over the dominant estate with reasonable trouble and expense.⁴²

1615. A *party-wall* is one erected on the line between two estates, owned by different persons, for the use of both estates. The owners of a party-wall, built at joint expense, are not tenants in common, but each is proprietor of his own land, with a right to use the wall; and it is this which creates the ease-

³⁷ *Wilde v. Minsterley*, 2 Rolle, 565; *Humphries v. Brogden*, 12 Q. B. 743; *Thurston v. Hancock*, 12 Mass. 229; *Foley v. Wyeth*, 2 All. Mass. 131; *Lassala v. Holbrook*, 4 Paige, Ch. N. Y. 169; *Farrand v. Marshall*, 21 Barb. N. Y. 409; *Hay v. The Cohoes Co.* 2 N. Y. 162; *McGuire v. Grant*, 1 Dutch. N. J. 356; *Charless v. Rankin*, 22 Mo. 566; *Richardson v. Vermont R. R. Co.* 25 Vt. 465.

³⁸ *Wyatt v. Harrison*, 3 Barnw. & Ad. 871; *Partridge v. Scott*, 3 Mees. & W. Exch. 220; *Farrand v. Marshall*, 19 Barb. N. Y. 380; *Partridge v. Gilbert*, 15 N. Y. 601; *Charless v. Rankin*, 22 Mo. 566; *Shreve v. Stokes*, 8 B. Monr. Ky. 453.

³⁹ *Richart v. Scott*, 7 Watts, Penn. 460; *Hunt v. Peake*, 1 Johns. Ch. N. Y. 705; *Rogers v. Taylor*, 2 Hurlst. & N. Exch. 828; *Solomon v. Vintners Co.* 4 *id.* 585. But see *Dodd v. Holme*, 1 Ad. & E. 493; *Hide v. Themborough*, 1 Carr. & K. 250.

⁴⁰ *Chadwick v. Trower*, 6 Bingh. N. C. 1; *Napier v. Bulwinkle*, 5 Rich. So. C. 311.

⁴¹ As stated above it is impossible to reconcile the cases upon this point. A distinction is suggested in the case of *Johnson v. Jordan*, 2 Metc. Mass. 234, between the grant of the servient estate and the grant of the dominant estate, the grantor in either case retaining the other, and the considerations are somewhat different still in case both estates are granted at the same time. The case against the existence of such right is, evidently, stronger when the dominant estate remains in the grantor than when it is conveyed. The doctrine, as stated in the text, is substantially sustained in the following cases: *Viall v. Carpenter*, 14 Gray, Mass. 126; *Carbrey v. Willis*, 7 All. Mass. 364; *Randall v. McLaughlin*, 10 *id.* 366; *Lampman v. Wilks*, 21 N. Y. 505; *Suffield v. Brown* (Lord Westbury), 26 Bost. Law Rep. 440. And the doctrine that an easement used *de facto* in connection with an estate would be reserved to the grantor of a parcel without an express reservation is supported in *Pyer v. Carter*, 1 Hurlst. & N. Exch. 916.

⁴² *Nichols v. Luce*, 24 Pick. Mass. 102; *Thayer v. Payne*, 2 Cush. Mass. 327; *Carbrey v. Willis*, 7 All. Mass. 364.

ment. But inasmuch as the two parts of the wall are inseparable, and form together but one and the same *corpus*, the wall is considered, as between the owners, something in common.⁴³

Let us see how a party-wall is established, the rights which arise from it, and the obligations which are its result.

1616. The right to a party-wall may arise in consequence of a special agreement of the parties, and in that event, whatever are the provisions of the contract, they govern. In the absence of any agreement, party-walls are generally regulated by the acts of the local legislatures. The principles of these acts are generally that the wall shall be built equally on the lands of the adjoining owners at their joint expense.

When only one of the owners of two adjoining lots wishes to build, he has a right to build the wall of the usual thickness, partly upon his own ground and partly upon the adjoining estate. In this case, when the other owner is desirous of building, he may use so much of said party-wall as he may want by paying one half of its value to the first builder, and then they are joint owners of such party-wall.

In case the first builder erects his wall within his own line, so as to leave a space beyond that which is required by law to be allowed to the adjoining owner, such wall can never become a party-wall; but if such first builder should erect his wall so that the outer face should be on the line, then it will become a party-wall on the adjoining owner building against it.

1617. Each of the owners of a party-wall may place his joists in it, and use it for the support of his roof. Each may use the wall for all the purposes to which it is destined; he is limited in his right so far only as not to cause his neighbor any injury.

Each may raise the wall to such a height as he may deem proper, without, however, endangering his neighbor, and provided by such raising the rights of the neighbor be not infringed; as, for example, by depriving him of some easement to which he is entitled.

When the party-wall has been built, and one of the adjoining owners is desirous of having a deeper foundation, he has a right to undermine such wall, using due care and diligence to prevent any injury to his neighbor; and having done so, he is not liable for any consequential damages which may ensue.⁴⁴

It is evident that the parties can use the party-wall for no other purpose than those for which it was intended. One of them cannot, therefore, open a window through such wall without the consent of the other, nor put a stove-pipe there, nor do anything which would encroach on his neighbor beyond the line between the two properties.

1618. The obligations which the party-wall impose upon the proprietors are, that each will take ordinary care of it. But the charges the most important in relation to it are its repairs and reconstruction. Each one is bound to pay for one half of the repairs of so much of it as he uses.

When a wall is unfit for the use intended by one of the owners, he should cause it to be examined by the proper officer, where such an officer exists, and cause it to be condemned. He may then pull it down; but this must be done with care, and with notice to the opposite party of his intention to do so a reasonable time before it is done, so as to give an opportunity to the latter to protect his house from injury.

⁴³ See *Matts. v. Hawkins*, 5 Taunt. 20; *Cubitt v. Porter*, 8 Barnew. & C. 257.

⁴⁴ *Lassala v. Holbrook*, 4 Paige, Ch. N. Y. 169; *Richart v. Scott*, 7 Watts, Penn. 460; *Dodd v. Holme*, 8 Nev. & M. 739. See *Thurston v. Hancock*, 12 Mass. 221; *Raine v. Alderson*, 4 Bingh. N. C. 702.

He who takes down the wall is required to erect another in its place in a reasonable time and with the least possible inconvenience. The other owner must contribute to the expense, if the wall requires repairs, but such expense will be limited to the costs of the old wall.⁴⁵

1619. Another legal easement is the enjoyment of an ancient window by which a right is acquired by prescription to use it to the inconvenience and loss of the owner of the adjoining estate.⁴⁶ *Ancient lights* are windows which have been opened for twenty years, and enjoyed without molestation by the owner of the house.

The English doctrine, which is examined below, is not applicable in this country. The doctrine must be regarded as established here that no mere use or continuance of windows overlooking the estate of another, for whatever length of time protracted, will prevent the erection of any building on such land.⁴⁷

1620. *This right may in England be gained* in two ways: by grant, which is not proper to consider under this head, as that is a conventional mode of gaining the right; and by prescription, which is strictly a legal easement, as it arises from the act of the law, or by so long a use of time as will raise a presumption that a grant existed.

Formerly a party could not gain a right to a window except by prescription without the consent of the owner of the adjoining estate.⁴⁸ But in modern times, upon proof of an adverse enjoyment of lights for twenty years or upward, unexplained, a jury may be directed to presume a right by grant or otherwise.⁴⁹ When, however, there are circumstances which explain this apparent acquiescence, the right will not be acquired; as, where a window was opened during the seisin of a mere tenant for life, or a tenancy for years, and the owner of the fee did not acquiesce in or know of the use of the light.⁵⁰

1621. *The extent of the right* is limited, when acquired, by lapse of time, to the use to which it has been applied; for example, where a house had been used as a malt-house with small windows sufficient for that purpose, and it was converted into a dwelling which required larger windows, it was held to be entitled to the same quantity of light it had in its former state, and no more.⁵¹

Light and air are necessary to a dwelling, so as to give the owner the full enjoyment of his estate, but this necessity does not extend to a prospect or view from it; the owner of the adjoining estate may, therefore, build so as to intercept the view of the first builder,⁵² or disturb his privacy.⁵³

The right to a window opening upon a neighbor may be acquired by the acts of the parties; as, where houses adjoining each other are built by one person upon a plan, and afterward he separates the ownership or occupation, each party taking a part impliedly engages not to alter or affect the existing state of the buildings, and in that case, even six years or less will give as perfect a

⁴⁵ *Campbell v. Messier*, 4 Johns. Ch. N. Y. 334.

⁴⁶ See 1 Nelson, Abr. 56, 57; 16 Viner, Abr. 26; 23 Am. Jur. 46 to 64; Mathews, Presumption, 318 to 323; 1 Chitty, Pract. 206, 208; 1 Leigh, Nisi P. ch. 6, 3, 8; Story, Eq. Jur. § 926; 1 Smith, Ch. Pr. § 93.

⁴⁷ *Pierre v. Fernald*, 26 Me. 436; *Carrig v. Dee*, 14 Gray. Mass. 583; *Rogers v. Sawin*, 10 id. 376; *Radcliff v. Mayor, etc.*, 4 N. Y. 200; *Lampman v. Wilks*, 21 id. 511; *Haverstick v. Sipe*, 33 Penn. St. 368; *Cherry v. Stein*, 11 Md. 1, 24; *Napier v. Bulwinkle*, 5 Rich. So. C. 311; *Ingraham v. Hutchinson*, 2 Conn. 584; *Ward v. Neal*, 35 Ala. N. S. 602. Contra, *Gerber v. Grabel*, 16 Ill. 217; *Robeson v. Pittenger*, 1 Green, Ch. N. J. 57; *Durel v. Bois-blanc*, 1 La. Ann. 407.

⁴⁸ 1 Leon. 188; *Croke*, Eliz. 118.

⁴⁹ 2 Saund. 175, a; *Story v. Odin*, 12 Mass. 159.

⁵⁰ *Daniel v. North*, 11 East 372.

⁵¹ *Martin v. Goble*, 1 Campb. 322. See *Chandler v. Thompson*, 3 Campb. 80.

⁵² *Aldred's case*, 9 Coke, 58; *Attorney General v. Doughty*, 2 Ves. Ch. 432; *Crabb, Real Prop.* § 446; *Bacon, Abr. Actions in General*, B; *Mohan v. Brown*, 13 Wend. N. Y. 261.

⁵³ *Cotterell v. Griffiths*, 4 Esp. 69.

right to the free use of a modern window, as in any other case twenty years' adverse enjoyment would create.⁵⁴ Upon the same principle, where the owner of a house with a window on a vacant lot which belongs to him sells it without any reservation as to the window, the purchaser will be entitled to the window.⁵⁵

1622. When an *interruption* of a light takes place, the time which is required to give the owner of it a right by prescription commences from his assertion of the right after such interruption. The best remedy to prevent such window from gaining the character of an ancient light is to build opposite to it so as to block it up.⁵⁶

The right to an ancient light may be lost by agreement of the parties, and where the window has been completely blocked up for twenty years it loses its privilege.⁵⁷

1623. Where an ancient light has been unlawfully interrupted, an action on the case lies against the tortfeasor.⁵⁸ And when the right is clearly established, courts of equity will grant an injunction to restrain a party from building so near the plaintiff's house as to darken his windows.⁵⁹

1624. There are numerous easements which arise from vicinage, particularly in urban districts; among the most prominent of these are drain, drip, and support.

1625. *The right of drain, jus aquæductus*, is an easement which gives the owner of land the right to bring down water through or from the land of another, either from its source or from any other place.

When the source or spring from which the water is drawn fails and becomes dry, the easement of course cannot be exercised; but, unlike a personal right, which, once suspended, is gone for ever, when the water returns, the right to the easement is revived.⁶⁰

This easement does not exist at common law except as the result of grant or its equivalent by prescription, in which case it is of course controlled by the terms of the grant or the character of the prescription.

1626. In the description of land we have said that it extended downward to the centre of the earth and upward to the sky. To build a house adjoining your neighbor, and to make the roof so far extend over his ground that the rain-water which falls on your roof descends on his ground, would be an infringement of that right, but he might have granted to his neighbor the right to let such water fall upon his ground, or the neighbor might have acquired such right by lapse of time.⁶¹

The right of drip, jus cloacæ, is an easement by which the water which naturally falls on the house of one is allowed to fall upon the land of another.⁶² This arises in consequence of the right to project over in building, *jus projicendi et protegendi*. This may be by letting the water drop from the roof naturally on the ground, or by means of water-spouts: *servitus stillicidii et fluminis*.

The civil law contains many reasonable provisions on the subject of these easements or servitudes. The owner of the dominant estate may lessen the

⁵⁴ *Compton v. Richards*, 1 Price, Exch. 27; *Rivere v. Bower*, 1 Ry. & M. 24; *Story v. Odin*, 12 Mass. 157. See *Selden v. Williams*, 9 Watts, Penn. 13; 1 Lev. 122; 2 Saund. 114, n. 4; 1 Leigh, Nisi P. 559.

⁵⁵ *Palmer v. Fletcher*, 1 Lev. 122; 1 Sid. 167; 1 Kebl. 553; 12 Mass. 157.

⁵⁶ *Chandler v. Thompson*, 3 Campb. 82; *Moore v. Rawson*, 3 Barnew. & C. 332.

⁵⁷ *Lawrence v. Obee*, 3 Campb. 514; *Corning v. Gould*, 16 Wend. N. Y. 531; *Crabb*, Real Prop. §§ 459, 460.

⁵⁸ 2 Rolle, Abr. 140; Bacon, Abr. *Action on the Case*, D.

⁵⁹ *Eden*, Inj. 268, 269; *Story*, Eq. Jur. § 926; 1 Smith, Ch. Pr. 593.

⁶⁰ See *Watkins v. Peck*, 13 N. H. 360.

⁶¹ See 1 Rolle, Abr. 107; 2 Rolle, Abr. *Nuisance*, G. pl. 11.

⁶² Dig. 8, 1, 7.

burden of the servient inheritance, but he can never increase it without the consent of its proprietor; he may raise his house and his water-spouts, because that elevation renders the servitude less onerous; but he cannot lower them, because that would make the servitude more inconvenient. He cannot increase the surface of his roof, nor permit the water from neighboring roofs to increase that which naturally falls on his own.⁶³

It is extremely doubtful if this easement of drip from the eaves of a building will be recognized as existing by law in the United States or capable of acquisition by prescription. It seems to be closely analogous in its nature to the easement of lights where the impossibility of preventing the use, except at great and unreasonable inconvenience and expense, is allowed as a controlling reason for not presuming acquiescence on the part of the servient estate in a claim by the dominant.⁶⁴ There are not the same difficulties in establishing or overthrowing the right when water is discharged from a spout in a defined channel or stream ejected from a pipe.

1627. *The right of support, oneris ferendi*, is the name of an easement by which the wall or pillar of one house is bound to sustain the weight of the building adjoining.⁶⁵

A right somewhat similar, called by the civilians *tigni immittendi*, is the right of inserting a beam or timber from the wall of one house into that of a neighboring house in order that it may rest on the latter, and that the wall of the latter may bear the weight.⁶⁶

The owner of the servient building is bound in both cases to repair and keep it sufficiently strong for the weight it has to bear.⁶⁷

"Where there has been no party-wall," says Chancellor Kent,⁶⁸ "but the walls of the house pulled down stood wholly on its lot, yet if the beams of the other house rested upon the wall pulled down, and had done so for a period sufficient to establish an easement by prescription, the owner of the adjoining house would be entitled to have his beams inserted for a resting-place in the new wall."

1628. *The easement in ways* will be considered by taking a view of the right to public ways; of private ways; and of ways of necessity.⁶⁹

1629. A *public highway* is a passage through the country, or some part of it, by which there is a right given to all the community to pass over the land of another. It is established either by law or by the act of the owner of the land over which such public road passes.

1630. When it is established by law, as where it is opened under the direction of a legislative act, it is in general unlimited as to its use, and all the community may pass and repass with or without cattle, provided that in so doing they do not infringe on the provisions of the laws regulating roads.

But when such roads are laid out by the owner of land, he may annex what limitations or conditions he pleases to the grant. When there are no limitations, the public may use it in the same manner as one laid out by public authority. In general, the owner of the land over which a way has been laid out remains the owner of everything except the easement due to the public.

⁶³ Dig. 8, 2, 20, 5; Dig. 8, 3, 29.

⁶⁴ See *Thomas v. Thomas*, 2 Crompt. M. & R. Exch. 34; *Bellows v. Sackett*, 15 Barb. N. Y. 96.

⁶⁵ *Richards v. Rose*, 9 Exch. 218; *Partridge v. Scott*, 3 Mees. & W. Exch. 220; *Partridge v. Gilbert*, 15 N. Y. 601. But see *Solomon v. Vintners Co.* 4 Hurlst. & N. Exch. 585.

⁶⁶ Dig. 8, 2, 36; Dig. 8, 5, 14.

⁶⁷ Dig. 8, 2, 23.

⁶⁸ 3 Kent, Comm. 437, 4th ed.

⁶⁹ See generally 4 Viner, Abr. 502; Bacon, Abr. *Ways*; Comyn, Dig. *Chemin*; Egremont, Highways; Wellbeloved, Highways; Woolrich, Ways; Dane, Abr. *Index, Ways*.

He is therefore entitled to the grass or trees or fruit which grow at the sides of the highway,⁷⁰ and to all mines and minerals below the surface.⁷¹

1631. The grant of the way may be expressly by deed, or it may arise from the acts of the owners of the land by dedicating the road to public use by throwing it open for that purpose, no other formality being requisite, though in fact there be no specific grantee *in esse* at the time, to whom the fee could be conveyed.⁷²

What will amount to such a dedication depends somewhat upon circumstances. As to lapse of time since the public began to use the way, it has been held that eight, or even six years, without impediment, is evidence from which a dedication to the public may be inferred.⁷³

But it must be remembered that he who dedicates the way to the public must have a fee. A tenant for years, though it be ninety-nine years, cannot dedicate a way to public use to the injury of the reversioner.⁷⁴ He cannot grant, by his license, any greater right than he possesses.

Long continued use establishes the existence of a highway as a public way.⁷⁵

1632. A public way may be used by the public at all times and in any man-

⁷⁰ *Adams v. Emerson*, 6 Pick. Mass. 56.

⁷¹ 1 Rolle, Abr. 392, 1, 5; Comyn, Dig. *Chemin*, A 2; Bouvier, Law Dict. *Road*; 3 Kent, Com. 433, n.

⁷² *Town of Pawlet v. Clark*, 9 Cranch, 292; *Brown v. Manning*, 6 Ohio, 303; *Cincinnati v. White*, 6 Pet. 431.

⁷³ *Trustees v. Merryweather*, 11 East, 375, n.; *Young v. Garland*, 18 Me. 409. See the *State v. Marble*, 4 Ired. No. C. 318; *Valentine v. Boston*, 22 Pick. Mass. 75; *The State v. Hunter*, 5 Ired. No. C. 369; *Williams v. Cummington*, 18 Pick. Mass. 312; *Matter of 29th street*, 1 Hill, N. Y. 189; *Opening of 39th street*, 1 Hill, N. Y. 191; *Taylor v. Bailey*, Wright, Ohio, 646; *Esling v. Williams*, 10 Penn. St. 126; *Gardiner v. Tisdale*, 2 Wisc. 153; *Connehan v. Ford*, 9 *id.* 240; *Pomeroy v. Wills*, 3 Vt. 279. There are some points of distinction between a dedication and prescription as the source of a right of way which are quite material. A prescription can only avail in behalf of a corporation, individual or some definite body of individuals; *Washburn, Easements*, 125; *Commonwealth v. Newbury*, 2 Pick. Mass. 51; *Green v. Chelsea*, 24 *id.* 71; *Smith v. Kinnard*, 2 Hill, So. C. 642; *Rose v. Bunn*, 21 N. Y. 275. The right when acquired must be exercised in the manner in which it is established, and must have been exercised for the requisite time; *Avery v. Stewart*, 1 Cush. Mass. 496; *Durgin v. City of Lowell*, 3 All. Mass. 398. A dedication devotes the land to the public use, and there need be nobody in existence capable of being made a grantee; *Hunter v. Sandy Hill*, 6 Hill, N. Y. 407; *Abbot v. Mills*, 3 Vt. 521; *Pomeroy v. Mills*, 3 *id.* 279; *Brown v. Manning*, 6 Ohio, 298; *Kennedy v. Jones*, 11 Ala. n. s. 63; *Warren v. Jacksonville*, 15 Ill. 236; *Cady v. Conger*, 19 N. Y. 256; *Cole v. Sprowl*, 35 Me. 161; *Vick v. Vicksburg*, 1 Miss. 379; *Hale v. McLeod*, 2 Metc. Ky. 98; *Gowen v. Philadelphia*, 5 Watts. & S. Penn. 141; *Pearsall v. Post*, 20 Wend. N. Y. 115; *Cincinnati v. White*, 6 Pet. 432; *Pawlet v. Clark*, 9 Cranch, 292. It will undoubtedly extend to new uses of the public, at least to those analogous to the uses made at the time of dedication; *Rowan v. Portland*, 8 B. Monr. Ky. 248. But see as to partial dedication, *Poole v. Huskinson*, 11 Mees. & W. Exch. 827; *Banaclough v. Johnson*, 8 Ad. & E. 99; *Gowen v. Philadelphia*, 5 Watts. & S. Penn. 141; *Hemphill v. Boston*, 8 Cush. Mass. 195; *State v. Trask*, 6 Vt. 355. It is operative at the concurrence of the act and intention, the question of length of use, whether longer or shorter than the period of prescription, being simply an indication of intention; *Larned v. Larned*, 11 Metc. Mass. 421; *Procter v. Lewiston*, 25 Ill. 153; *Stacey v. Miller*, 14 Mo. 478; *Durrel v. Barnard*, 28 Me. 554; *Skeen v. Lynch*, 1 Rob. Va. 186; *Ward v. Davis*, 3 Sandf. N. Y. 502. The intention of the owner and acceptance by the public complete the dedication. *Green v. Chelsea*, 24 Pick. Mass. 71; *Child v. Chappell*, 9 N. Y. 256; *Commonwealth v. Rush*, 14 Penn. St. 186. When completed, the dedication is irrevocable. *New Orleans v. U. States*, 10 Pet. 662; *Commonwealth v. Alburger*, 1 Whart. Penn. 469; *Huber v. Gazley*, 18 Ohio, 18; *State v. Trask*, 6 Vt. 355; *Ragan v. McCoy*, 29 Mo. 356. The whole question of dedication of public ways and the nature of the rights acquired is elaborately examined in *Washburn on Easements*, and reference may profitably be made to that work.

⁷⁴ *Wood v. Veal*, 5 Barnew. & Ald. 454; *Schenley v. Commonwealth*, 36 Penn. St. 29; *Ward v. Davis*, 3 Sandf. N. Y. 502.

⁷⁵ *Folger v. Worth*, 19 Pick. Mass. 108; *Jennings v. Tisbury*, 5 Gray, Mass. 73; *State v. Hunter*, 5 Ired. No. C. 369; *Nash v. Peden*, 1 Speers, Eq. So. C. 17.

ner not calculated to destroy the road nor forbidden by local public regulations. When the way becomes impassable, as by a flood, or if it be out of repair, it is lawful for a traveller to go upon the adjoining land, doing as little damage as possible; and in such case such adjoining land becomes a temporary way.⁷⁶ This right, which is given from public policy, is confined to a public way; one having a right over a private way cannot go over the adjoining land because such private way is muddy and impassable. The reason assigned for this is, that the person having a right of way is generally bound to repair it.⁷⁷

1633. *Public ways are of various kinds*, the principal of which are the following:

Public ways, such as have been already mentioned as being established by public authority, or by grant or dedication to public use.

A public passage is the same as a public highway, with this difference only, that as the one is a right to pass over the land of another, so the other is a privilege of crossing his water, or if the water is a running stream, then, perhaps, more accurately speaking, over his land covered with water.⁷⁸

A public quay, like a public highway, is common to the whole community.⁷⁹

Lord Coke, adopting the civil law in this respect, says there are three kinds of ways, namely: a foot-way, called *iter*; a foot-way and horse-way, called *actus*; a cart-way, which contains the other two, called *via*.⁸⁰

1634. *A private right of way* is that private right which one man has of going over another's land. It is confined either to the inhabitants of a particular district, or to those occupying or owning certain estates, or it extends to one or more individuals in certain.

To every private way two requisites are essential: *the terminus à quo*, or the place from which the grantee is to set out in order to use the way; and *the terminus ad quem*, the place where the way is to end.⁸¹ Secondly, that the grantee have the right, and not a mere revocable license or permission, of setting out from the *terminus à quo* and of proceeding to and entering the *terminus ad quem*, for otherwise the privilege cannot be exercised, and the rule of law, that a grant which cannot take effect is void, would attach.

When a private right of way is an appurtenance to land, it will pass as a necessary incident belonging to it on a grant of the land. It can only be enjoyed with the estate to which it is annexed; it cannot be made over by itself to another.⁸² If the right of way be in gross, or a mere personal right, it cannot be assigned to any other person, nor transmitted by descent. It being a mere personal right, it dies with him who is entitled to it.⁸³

1635. In general, *the right to a private way is established by grant or prescription*. When such a right is established in favor of a piece of land, and that is divided into several parcels and sold to different individuals, each parcel, however small, is entitled to the right.⁸⁴ But this right cannot be extended to

⁷⁶ *Young v. —*, 3 Term. 263; Dougl. 749.

⁷⁷ *Taylor v. Whitehead*, Dougl. 745; *Henn's case*, 3 Salk. 182, pl. 4.

⁷⁸ *Carth.* 193.

⁷⁹ *Bolt v. Stennett*, 8 Term. 606. See *Mayor of New Orleans v. Gravier*, 11 Mart. La. 620.

⁸⁰ *Coke*, Litt. 56, a; *Pothier*, Pand. lib. 8, t. 3, s. 1; Dig. 8, 3; 1 *Brown*, Civ. Law, 177; *Crabb*, Real Prop. § 360-397.

⁸¹ See *Miller v. Bristol*, 12 Pick. Mass. 550.

⁸² See *Shepherd v. Watson*, 1 Watts Penn. 35; *Ritger v. Parker*, 8 Cush. Mass. 145; *French v. Braintree Co.* 23 Pick. Mass. 216; *Garrison v. Rudd*, 19 Ill. 558; *Acroyd v. Smith*, 10 C. B. 164.

⁸³ *Finch*, Law, 17, 31; *Hammond*, Nisi P. 195.

⁸⁴ *Matson v. Bioren*, 1 Serg. & R. Penn. 227; *Case of a private road*, 1 Ashm. Penn. 417; *Lewis v. Carstairs*, 6 Whart. Penn. 193.

other land of the owner of the dominant estate, because that would increase the burden of the easement on the servient estate.⁸⁵ Nor can it be extended to a change of use of the premises which will materially alter and enlarge the burden upon the servient estate.⁸⁶

1636. When such a right is obtained by grant, it must of course be used strictly according to the letter and spirit of the instrument which shows the agreement between the parties; if the right is to pass on foot and not with horses, the owner of the dominant estate cannot pass there with horses.

Difficulties arise as to the manner in which a private way is to be used when the right has been obtained by prescription, which presumes a grant, for in such case the extent of the grant is uncertain. But if we remember that the possessor acquires nothing by prescription except what he has possessed, we shall be aided in our efforts to ascertain the rights thus acquired. It is a maxim, *tantum prescriptum, quantum possessum*; and the rule is founded on this, that prescription, being an effect of possession, can have no greater extent than its cause nor operate in anything beyond it.

The right of going on foot is not that of going on horseback; the right to pass over a way on horseback is not that of going over it in a carriage; the right of passing during the day is not that of passing during the night; the right of passing at one season of the year is not that of passing at another; the right of passing for one object, as, for example, to gather your crop, is not the right of passing for another object. This divisibility of the different rights of easements is almost infinite. If possession has been extended only to one of these modes of using a right, the prescription cannot be extended to any other mode.⁸⁷ And as the claimant of the easement desires to establish a right, he must affirmatively show that his right to the easement covers the extent of his claim.

1637. When one of two parcels of land, which belonged to the same owner at the time of a conveyance, is so surrounded or enclosed by the other parcel, or by that parcel and the land of strangers, that there is no access or egress except over such other parcel, the law confers a right of way over such other parcel, which is called a *way of necessity*.⁸⁸ This right is given on grounds of public policy, and is so far an incident to the grant or a reservation from it that it will pass with a conveyance of the enclosed parcel so long as the necessity exists.⁸⁹ This rule applies where the enclosed estate is retained by the grantor as well as where it is the one sold.⁹⁰

1638. Such an easement can arise only where there is an absolute necessity

⁸⁵ *Kirkham v. Sharp*, 1 Whart. Penn. 323; *Davenport v. Lamson*, 21 Pick. Mass. 72; *Jamison v. McCreedy*, 5 Watts. & S. Penn. 129.

⁸⁶ *Appleton v. Fullerton*, 1 Gray. Mass. 186; *Whitney v. Lee*, 1 All. Mass. 198; *Hills v. Miller*, 3 Paige, Ch. N. Y. 254, division of estates. *Allan v. Gomme*, 11 Ad. & E. 759; *Metropolitan Cemetery v. Eden*, 16 C. B. 42.

⁸⁷ *Senhouse v. Christian*, 1 Term, 560; *Hawkins v. Carbines*, 3 Hurlst. & N. Exch. 914; *Burton v. Hall*, 1 Q. B. 792; *Allan v. Gomme*, 11 Ad. & E. 759; *Cowling v. Higginson*, 4 Mees. & W. Exch. 245; *Knight v. Moore*, 3 Bingh. N. C. 3; *Higham v. Rabett*, 5 *id.* 622; *Comstock v. Van Deusen*, 5 Pick. Mass. 163; *Jones v. Percival*, 5 *id.* 485; *Davenport v. Lamson*, 21 *id.* 72; *Atkins v. Bordman*, 2 Metc. Mass. 457; *Shroder v. Brennehan*, 28 Penn. St. 348; *French v. Marstin*, 24 N. H. 440.

⁸⁸ *Washburn, Easements*, 162; *New York Life Co. v. Milnor*, 1 Barb. Ch. N. Y. 353, 366; *Collins v. Prentice*, 15 Conn. 39; *Marshall v. Trumbull*, 28 *id.* 183; *Brice v. Randall*, 7 Gill. & J. Md. 349; *Kimball v. Cocheco R. R.* 27 N. H. 449; *Trask v. Patterson*, 29 Me. 499; *Grant v. Chase*, 17 Mass. 443.

⁸⁹ *Proctor v. Hodgson*, 10 Exch. 824; *White v. Leeson*, 5 Hurlst. & N. Exch. 53; *Lawton v. Rivers*, 2 M'Cord, So. C. 445; *Nichols v. Luce*, 24 Pick. Mass. 102; *Wissler v. Hershey*, 23 Penn. St. 333.

⁹⁰ *Clark v. Cogge, Croke, Jac.* 170; *Brigham v. Smith*, 4 Gray. Mass. 297; *Viall v. Carpenter*, 14 *id.* 126.

for its exercise to obtain access and egress,⁹¹ or, as stated in some cases, when there are no other means of passing from the land into the public street or road.⁹²

Mere inconvenience is not enough; as, where an estate was partly surrounded by water,⁹³ or the way over the owner's other land was very steep and rough,⁹⁴ and other cases of great inconvenience. And the way ceases when it ceases to be indispensable.⁹⁵

1639. A way of necessity, as the term implies, must be limited to what is indispensable to enable the owner of the enclosed land to go to the public highway; and, in general, it must be made where it will be the least injurious to the owner of the land,⁹⁶ consistently with the right of the owner of the enclosed lot to have a convenient and reasonable mode of enjoying the premises.⁹⁷

1640. *Easements may be extinguished* by acts of the party entitled, or by operation of law. The civilians enumerate nine methods of extinguishing a servitude, but so far as these have any application at common law, they are embraced under one or the other of the above heads.⁹⁸

1641. A man may *release* or *relinquish*, by a deed executed in due form of law, any right or interest which he may have in the lands or tenements of another person; and this power extends to easements as well as to other rights of property.

A change of condition of the dominant estate, whereby an increased burden is imposed upon the servient estate, where the enjoyment of the excess cannot be separated from the original easement, will extinguish the easement.⁹⁹ But mere abuse of the right or excess, or change of mode of use, does not terminate it.¹⁰⁰

1642. The owner may *abandon* an easement. The question of abandonment is, in each case, a question of fact, depending in a great measure upon the intention of the party. Mere non-user is not necessarily an abandonment, but is naturally good evidence when unexplained.¹⁰¹ The character of the easement is important in considering the weight to be given to acts.¹⁰² If the owner of the

⁹¹ McDonald v. Lindall, 3 Rawle, Penn. 495; Allen v. Kincaid, 11 Me. 156; Turnbull v. Rivers, 3 M'Cord, So. C. 139; Jetter v. Mann, 2 Hill, So. C. 641.

⁹² Grant v. Chase, 17 Mass. 443; Smyles v. Hastings, 22 N. Y. 217; Collins v. Prentice, 15 Conn. 39; Hyde v. Jamaica, 27 Vt. 443.

⁹³ Turnbull v. Rivers, 3 M'Cord, So. C. 131; see Cooper v. Maupin, 6 Mo. 624; Anderson v. Buchanan, 8 Ind. 132.

⁹⁴ McDonald v. Lindall, 3 Rawle, Penn. 495.

⁹⁵ Seeley v. Bishop, 19 Conn. 128; Holmes v. Seely, 19 Wend. N. Y. 507; Nichols v. Luce, 24 Pick. Mass. 102; Viall v. Carpenter, 14 Gray, Mass. 126; see New York Life, etc., Co. v. Milnor, 1 Barb. Ch. N. Y. 353; Allen v. Kincaid, 11 Me. 155.

⁹⁶ Russell v. Jackson, 2 Pick. Mass. 577; McDonald v. Lindall, 3 Rawle, Penn. 492.

⁹⁷ Edgington v. Morris, 8 Taunt. 31. The owner of the servient estate is generally to select the place of a new way. Capers v. Wilson, 3 M'Cord, So. C. 170; Russell v. Jackson, 2 Pick. Mass. 574; Holmes v. Seely, 19 Wend. N. Y. 507; Smiles v. Hastings, 24 Barb. N. Y. 44; and see Pinnington v. Galland, 9 Exch. 1; Nichols v. Luce, 24 Pick. Mass. 102; Hart v. Conner, 25 Conn. 331.

⁹⁸ These several methods are discussed in the Répertoire de Jurisprudence, by Merlin, (word Servitude,) in an article composed with great care, and also by Toullier in his Droit Civil Français, Vol. 3.

⁹⁹ Wood v. Copper M. Co., 14 C. B. 428; Sharpe v. Hancock, 7 Mann. & G. 354; Garritt v. Sharp, 3 Ad. & E. 325; Blanchard v. Bridges, 4 id. 176; Renshaw v. Bean, 18 Q. B. 112; see Hutchinson v. Copestake, 9 C. B. n. s. 863; Binckes v. Pash, 24 Bost. Law Rep. 427.

¹⁰⁰ Dyer v. Sanford, 9 Metc. Mass. 395; Mendell v. Delano, 7 id. 176; M'Donald v. Bear River Co., 13 Cal. 220.

¹⁰¹ Perkins v. Dunham, 8 Strobb. So. C. 224; Pope v. Devereux, 5 Gray, Mass. 409; Wright v. Freeman, 5 Harr. & J. Md. 467; Ballard v. Butler, 30 Me. 94; Crain v. Fox, 16 Barb. N. Y. 184; Stokoe v. Singers, 8 Ell. & B. 31; Lovell v. Smith, 3 C. B. n. s. 120.

¹⁰² Taylor v. Hampton, 4 M'Cord, So. C. 96; Partridge v. Gilbert, 15 N. Y. 601.

servient estate has been led to treat the estate as freed from the servitude, and has put the estate in such a condition that the easement cannot be resumed without injury to his rights,¹⁰³ or if there has been a transfer of the estate,¹⁰⁴ abandonment will be more readily presumed than where no change has taken place.

Mere non-user for twenty years will, in general, extinguish an easement which was acquired by prescription;¹⁰⁵ otherwise where it existed by deed.¹⁰⁶ An adverse enjoyment of the premises, however, for that length of time would extinguish an easement created by deed.¹⁰⁷ But in all these cases the non-user appears to operate rather by way of evidence of abandonment than by raising a conclusive presumption of release.¹⁰⁸

1643. In many cases an easement may be extinguished by the union of the title to the land to which the easement is annexed with the title to the land it encumbers under one and the same ownership. But this principle does not apply to a way of necessity; for in this case the right is merely suspended by the unity of ownership and possession while it exists.¹⁰⁹ Nor is the right to a natural water course extinguished by unity of title and possession. This results from the nature of the subject; indeed, from the necessity of the case, as was settled in *Shury v. Piggott*,¹¹⁰ and confirmed by Story, J., in *Hazard v. Robinson*.¹¹¹

But the right to use water in a particular way, as, by means of an aqueduct, may be effectually extinguished by the unity of title and possession of both the parcels of land, viz., of that benefitted and that burdened by the easement. We shall only add, that, whenever the adverse enjoyment is interrupted by unity of possession or otherwise during the period of prescription, the acquisition of a right by user must commence *de novo*, as in cases where there has been no previous adverse enjoyment.

1644. Having examined that class of incorporeal hereditaments which falls under the head of easements, it will be in order next to consider those which may be classed under the general head of *profits à prendre*, which are almost universally comprised under the term *common*.

By common is understood a right to take in common with the owner of the land the whole or a part of its produce, whether such produce arises above or below the surface.¹¹² The commoner's right or interest amounts to the privilege of taking the property of the grantor, who owns the estate burdened with the right of common, and no more.

The right of common is little known in the United States, yet there are some regulations to be found on the subject. The constitution of Illinois, for example, provides for the continuance of certain commons in that state.¹¹³

All unappropriated lands on the Chesapeake bay, or on the shores of the sea, or of any river or creek in the eastern parts of Virginia, ungranted and used in

¹⁰³ *Partridge v. Gilbert*, 15 N. Y. 601; *Thomas v. Hill*, 31 Me. 252; *Dunklee v. Wilton* R. R., 24 N. H. 489.

¹⁰⁴ *Stokoe v. Singers*, 8 Ell. & B. 31; *Corning v. Gould*, 16 Wend. N. Y. 531.

¹⁰⁵ *Moore v. Ranson*, 3 Barnew. & C. 332; *Lawrence v. Obee*, 3 Campb. 517.

¹⁰⁶ *Bannon v. Angier*, 2 All. Mass. 128; *Jewett v. Jewett*, 16 Barb. N. Y. 150; *Farrar v. Cooper*, 34 Me. 394; *Nitzell v. Paschall*, 3 Rawle, Penn. 76. See *Bowen v. Zeam*, 6 Rich. So. C. 298.

¹⁰⁷ *Yeakle v. Nace*, 2 Whart. Penn. 123; *Doe v. Hilder*, 2 Barnew. & Ald. 782.

¹⁰⁸ *Hillary v. Walker*, 12 Ves. Ch. 239; *Ward v. Ward*, 7 Exch. 838; *Hall v. Swift*, 6 Scott. 167; *French v. Braintree Manf. Co.*, 23 Pick. Mass. 216; *Hurd v. Curtis*, 7 Metc. Mass. 94; *Pillsbury v. Moore*, 44 Me. 94; *Townsend v. M'Donald*, 12 N. Y. 381; *Mowry v. Sheldon*, 2 R. I. 369.

¹⁰⁹ 3 Bulstr. 339.

¹¹⁰ 1 Saund. 323, n. 6; 8 Mas. C. C. 276.

¹¹¹ 3 Mas. C. C. 276.

¹¹² As to Commons, see Bacon, Abr.; Comyn, Dig.; Cruise, Real. Prop.

¹¹³ Ill. Const. art. 8, s. 8.

common, it is declared by a statute of that commonwealth shall remain so, and not be subject to grant.¹¹⁴

In most of the cities and towns of the United States there are considerable tracts of land appropriated to public use. These commons were generally laid out with the cities or towns where they are found, either by the original proprietors or early inhabitants, for the use of the public.¹¹⁵

Commons are said to be chiefly of four sorts, namely: of pasture, of piscary, of turbary, and of estovers.

1645. *Common of pasture* is the right of feeding one's beasts on another's land. It is either common appendant, common appurtenant, common *pur cause de vicinage*, or in gross.

It is proper to observe, before we proceed to the examination of these several kinds of common of pasture, that in general the right is to be enjoyed by a limited number of cattle; by beast *levant* and *couchant* upon the land to which the right is annexed, or by beast commonable.

By the expression cattle *levant* and *couchant* is properly meant as many beasts as may be fed with the produce of the land every day, taking one day with another, all the year round; or, if the privilege is limited to a particular period, then throughout that period. The term *levant* and *couchant* literally means rising and lying down.

The whole of the lands to which the right extends, or the lord's wastes, were liable to the commoner; by the statute of Merton, 20 Henry III, the lord was authorized to enclose such land as he had cultivated, or, as the ancient law said, approved, provided he left a sufficiency for the beasts of the commoners.¹¹⁶

By commonable cattle are intended such, and such only, as either till or manure the ground. And by great cattle are meant all manner of beasts, except sheep and yearlings.¹¹⁷

1646. A *common of pasture appendant* is in England a right which the tenants of a manor have to depasture in the lord's wastes their commonable cattle, *levant* and *couchant*, upon the ancient arable land of their tenements. It is said to be of common right to distinguish it from common arising by grant, because the privilege was originally conferred upon the tenants by the law itself to promote agriculture. This right is founded on prescription, and is regularly annexed to arable land, and cannot be severed from it.¹¹⁸ It may be assigned, apportioned, suspended, or extinguished.

1647. This right is *assignable*, and by assigning the land to which it is appendant, the right passes as a necessary incident to it.¹¹⁹

1648. It may be *apportioned* by granting over a parcel of the land to another, either for the whole or a part of the owner's estate. If, in making such division, so small a portion of the land be granted that it will not require one of the commonable cattle to till or manure it, then all the common shall remain with the grantor.¹²⁰

1649. This right may be *suspended*, either altogether or for a part only. It may be partially extinguished by the tenant accepting in parcel of the

¹¹⁴ 1 Va. Rev. Code, 142.

¹¹⁵ Commissioners of Bath v. Boyd, 1 Ired. No. C. 194; Carr v. Wallace, 7 Watts, Penn. 394. See Trustees v. Robinson, 12 Serg. & R. Penn. 33; Bird v. Montgomery, 6 Mo. 510.

¹¹⁶ 2 Sharswood, Blackst. Comm. 34. See Livingston v. Ten Broeck, 16 Johns. N. Y. 14; Rotherham v. Green, Croke, Eliz. 593; Leyman v. Abeel, 16 Johns. N. Y. 80; Watts v. Coffin, 11 Johns. N. Y. 495.

¹¹⁷ Anon, 2 Rolle, 173.

¹¹⁸ Bennett v. Reeve, Willes, 227.

¹¹⁹ 1 H. 4, M. 8, p. 6; 4 E. 3, M. 29, p. 46; Tyrringham's Case, 4 Coke, 36.

¹²⁰ Morse and Webb's Case, 13 Coke, 66; Willes, 227.

waste an equal or greater interest than he has in the arable land, that is, by unity of possession.¹²¹

1650. *Common appurtenant* is a right of feeding one's beasts on the land of another, which right is founded on a grant, or a prescription which supposes a grant.

1651. It is distinguished from common appendant in the four following particulars:

It is against common right, and must therefore be prescribed for if claimed by prescription.¹²² But where a grant exists it may be claimed by virtue of the grant; and user for fifty years is evidence from which to presume such a grant.¹²³

It may be claimed as annexed to any kind of land, as not arising from any tenure.

It may be claimed for any kind of cattle, not merely for commonable beasts or beasts of the plough, but for every kind of beast not commonable, as hogs, goats, geese, etc.

It may be commenced by grant within time of memory, and may be severed from the land to which it is appurtenant.

In most other respects commons appendant and appurtenant agree.

1652. *Common, because of vicinage* or neighborhood, is the right which the inhabitants of one or more townships or villis, which lie contiguous with each other, have of intercommuning with each other as they had formerly done. This common is appendant only inasmuch as it must be by prescription.¹²⁴

1653. *A common in gross*, or at large, is such as is neither appendant nor appurtenant to land, but is annexed to a man's person.¹²⁵

1654. *Common of piscary* is the right to fish in another's pond, pool, river, or other water. This species of common, like the others, may be appendant, appurtenant, or in gross.

1655. *Common of turbary* is the right to dig turf upon another's land. It may be appendant or appurtenant, or in gross, but it cannot be appendant to land, because turves are to be spent in the house.¹²⁶

This, unlike common of pasture, which is a mere right to feed cattle on the herbage, is a right of carrying away the soil itself. To this is nearly allied another common, namely, the liberty of digging for coals, stones, and minerals.¹²⁷

1656. *Common of estovers* is the right of taking the necessary wood for the use or furniture of a house or farm from the land of another.

It will be proper to consider their different kinds; how the right is acquired; what things may be taken; the time of taking; and how the right is to be used.

1657. When considered as to the use to which they are applied, estovers may be distinguished into four kinds, namely: house-bote, that is, wood for the necessary repairs of the house; fire-bote, or wood for consuming as fuel in the house; plough-bote, or wood for the repairs of ploughs and other implements of husbandry; cart-bote, for the repairs of carts and wagons; and hay or hedge-bote, for the repair of hedges or fences. The word bote is used synonymously with the word estovers.

¹²¹ See *Livingston v. Ten Broeck*, 16 Johns. N. Y. 14.

¹²² *Tyrringham's Case*, 4 Coke, 37.

¹²³ *Cowlan v. Slack*, 15 East, 108.

¹²⁴ *Tyrringham's Case*, 4 Coke, 38.

¹²⁵ 2 Sharswood, Blackst. Comm. 34.

¹²⁶ *Tyrringham's Case*, 4 Coke, 38.

¹²⁷ 1 Inst. 122, a; 4 Maule & S. 474.

When examined as to the manner by which the title is acquired, common of estovers is either appendant or appurtenant; but as such common of estovers must be used in a house, it cannot be common in gross.

1658. This right can be claimed only by grant or prescription, and if a grant be shown, it will then be appurtenant; if it be appendant, it is of common right. But as estovers is a profit *à prendre*, it cannot be claimed by custom.

1659. The commoner, as a general rule, may take only underwood, loppings, etc., but this right may, by prescription, be much enlarged, and extend to other wood.

1660. The time of taking estovers may be varied according to the usage of different manors, or throughout the year except in farming-time; and it may be also subject to other conditions as to time.

1661. It is an invariable rule that estovers must be spent on the premises which give the right to take them; and if to be used for repairs, they cannot be appropriated to other purposes. This privilege, being once attached to a house, cannot be severed from it; therefore, if the owner of the house grant the estovers to another, reserving the house to himself, or grant the house to another and reserving to himself the estovers, the latter shall not thereby be severed from the house, because they must be spent on it.¹²⁸

¹²⁸ Plowd, 381.

CHAPTER XVII.

RENT, ANNUITIES AND FRANCHISES.

- 1662-1687. Rent.
 - 1663. The kinds of rents.
- 1664-1668. How rents are created.
 - 1665. By what words.
 - 1666. To whom rent may be reserved.
 - 1667. The form of the contract.
 - 1668. Out of what things rent may be reserved.
- 1669-1686. Payment of rent.
 - 1669-1672. Time of payment.
 - 1670. The day of payment.
 - 1672. At what time of day rent is due.
 - 1673. Where rent is payable.
- 1674-1678. To whom rent is payable.
 - 1674. To the heir or executor.
 - 1676. To joint tenants.
 - 1677. To tenants in common.
 - 1678. To several assignees.
- 1679-1684. Right to receive rent, how affected.
 - 1680. By tortious acts of the lessor.
 - 1682. By neglect to make repairs.
 - 1683. By destruction of the premises.
 - 1684. By eviction of the tenant.
 - 1685. By whom rent is payable.
 - 1687. Remedies for the recovery of rent.
 - 1688. Annuities.
 - 1690. Franchises.

1662. The third kind of incorporeal inheritance is *rent*, which is a certain profit in money, provisions, chattels, or labor issuing out of lands and tene-ments in retribution for the use.¹

A rent somewhat resembles an annuity; their difference consists in the fact that the former issues out of lands, and the latter is a mere personal charge.

1663. At common law there were three *kinds of rents*, namely: rent service, rent charge, and rent seck.²

When the tenant held his land by fealty or other corporeal service, and a certain rent, this was called rent service; a right of distress was inseparably incident to this rent.

When the rent was created by deed and the fee granted, it was called a rent charge; and, as there was no fealty annexed to such grant of rent, the right of distress was not an incident. It required an express power of distress to be

¹ See, as to Rents, 2 Sharswood, Blackst. Comm. 41; Gilbert, Rents; Coke, Litt. 142, a; Comyn, L. & T. 95; Bradby, Distr. 24; Bacon, Abr. *Rent*; Crabb, Real Prop. §§ 149-258.

² Gilbert, Rents, 9; *Beaver v. Hartley*, 11 Penn. St. 254, 256; Coke, Litt. 142, a, sec. 218.

annexed to the grant, which gave it the name of rent charge because the lands were by the deed charged with a distress.³

A rent seek, or a dry or barren rent, was rent reserved by deed without a clause of distress; and in a case in which the owner of the rent had no future interest or reversion in the land, he was driven for a remedy to a writ of annuity, or a writ of assize.

But the statute of 4 Geo. II, c. 28, abolished all distinction in the several kinds of rent so far as to give the remedy by distress in cases of rent seek, rents of assize, and chief rents, as in the case of rent reserved upon a lease.

A fee farm rent is a perpetual rent reserved on a conveyance in fee simple. The deed usually contains a reservation of the rent, accompanied by a power of distress and re-entry on non-payment. In Pennsylvania a rent of this description is called a ground rent;⁴ in Massachusetts, a quit rent; and in New York and New Jersey, a rent charge. In this case, although the landlord has no reversionary interest, still he has a right of distress.⁵

1664. We shall consider by what words a rent is created, to whom the reservation may be made, upon what form of contract rent may be reserved, out of what things, the payment of the rent, and the remedies for the recovery of rent.

1665. The creation of rent, or the manner in which it is reserved, may be considered with respect to a rent service or to a rent charge.

A rent service, as we have seen, is a retribution for the land demised, and it must be reserved by such words as imply a return of something which was not in the grantor before, in lieu of the use of the land given, and it is properly reserved by the words reserving, rendering, yielding, and paying;⁶ but if the words of the deed reserve to the lessor something which was at the time in his possession, it will not be a good reservation; as, for example, excepting or saving. The thing reserved must be a profit issuing out of the land. The reservation may be of money, goods, provision, chattels, or labor.

The usual way of creating a rent charge is when a man who is seised of lands, by deed-pool or indenture, grants a yearly rent issuing out of the same land to another in fee, in tail, or for life, with a clause of distress.⁷

1666. It is a general rule that the rent must be reserved to the feoffor, donor, or lessor, or to his heirs, and it cannot be reserved to a stranger.⁸ But a man may reserve a rent to himself for life, and a different rent for his heir, or he may reserve a rent to his heir, omitting himself.⁹

³ Coke, Litt. 143, b.

⁴ *Ingersoll v. Sergeant*, 1 Whart. Penn. 337; *Franciscus v. Reigart*, 4 Watts, Penn. 98. The Emphyteosis of the civil law much resembles a ground rent; it was a contract by which the owner of an uncultivated piece of land granted it to another, either in perpetuity, or for a long time, on condition that he should improve it by building, planting, or cultivating it, and pay for it an annual rent; with a right in the grantee to alienate it, or transmit it by descent to his heirs, and under a condition that the grantor shall never re-enter as long as the rent is paid to him by the grantee or his assigns. Inst. 3, 25, 3; 3 Duvergier, n. 154; Faber, De Jure Emphyt., Definit. 36; Code, 4, 6, 11. In Louisiana such a rent is called a *rente foncière*. It is a rent which issues out of the land, and it is of its essence that it be perpetual, for if it be for a limited time, it is a lease. It may, however, be extinguished. La. Civ. Code, art. 2750. See Pothier, *Emphyteosis*.

⁵ Such rents have been recognized as valid in several of the states. *Adams v. Bucklin*, 7 Pick. Mass. 121; *Alexander v. Worrance*, 17 Mo. 228; *Walker*, Am. Law, 265; *Farley v. Craig*, 6 Halst. N. J. 262; *Wartenby v. Moran*, 3 Call. Va. 424; *Van Rensselaer v. Hays*, 19 N. Y. 68; *Scott v. Lunt*, 7 Pet. 596.

⁶ *Platt*, Cov. 50; *Royer v. Ake*, 3 Penn. 464; *Coke*, Litt. 47, a; *Gilbert*, Rents, 30; *Plowd.* 142; *Harrington v. Wise*, *Croke*, Eliz. 486; *F. Moore*, 459.

⁷ *Coke*, Litt. s. 218.

⁸ *Coke*, Litt. 143, b; *Gilbert*, Rents, 45; *Ege v. Ege*, 5 Watts, Penn. 134; *Oates v. Frith*, Hob. 130.

⁹ *Coke*, Litt. 213.

1667. The most usual mode of reservation of rents is on leases. These may be in writing, under seal or not under seal, or upon parol leases not in writing. These last leases are generally good only for a limited time. By the English statute of frauds¹⁰ it is declared "that all leases, estates, and terms of years, or any uncertain interest in lands, created by livery only or by parol, and not put in writing and signed by the party, should have the force and effect of leases or estates at will only, except leases for the term of three years, whereupon the rent reserved during the term shall amount to two-third parts of the full value of the thing demised." The principles of this statute have been adopted, with some modifications, in nearly all the states of the Union.

Rent may also be reserved upon every conveyance that either passes an estate to the tenant, or enlarges an estate already in him; but where no estate passes there ought to be no rent, the rent being a retribution for something given.¹¹

1668. As a general rule, rent must issue out of such an inheritance as that on which an entry may be made and a distress taken.¹² No rent can therefore be reserved as issuing out of an incorporeal hereditament, or thing lying in grant, because to such things no recourse can be had for a distress.¹³ But when this reason ceases, and, at a future time, the right of distress may be exercised, rent may be reserved out of an incorporeal hereditament; as, for example, reversions and remainders are incorporeal hereditaments, and can pass only by grant, yet a rent may be reserved upon them, although the grantor has no remedy for them during the continuance of the particular estate, yet there will be a remedy by distress when he comes into possession.¹⁴

Though rent cannot issue out of a personal chattel, yet if an estate is let, together with personal chattels, the rent may be reserved for the whole.¹⁵

1669. In regard to the *payment of rent*, it is to be considered when the rent is payable; where it is payable; to whom it is payable; and by whom it is payable.

As to the time when it is payable, we will examine as to the day of payment and what part of the day payment may be required.

1670. The *days of payment* are generally fixed by the parties in the lease or other instrument. When special days are limited by the reddendum, the rent must be limited according to the reddendum, and not according to the habendum. The computation according to the habendum takes place only when the reddendum is general, that is, yielding and paying quarterly so much rent.¹⁶

But when the parties have not appointed any particular day, a time is fixed by law, according to the intention of the parties.¹⁷ If, for example, a lease should be made on the first day of January, and the rent should be made payable on the first day of January and of July, the rent would be payable the first day of July following, for it was evidently the intention of the parties that the rent should be payable half-yearly from the date of the letting.¹⁸ And if no time be stated for the payment of the rent in a lease for a year, it is clear, as the contract is entire, that the rent is not due till the end of the year.¹⁹

1671. Rent may be made payable in advance, but then it must be specified clearly, for where a house was let at a yearly rent, payment to commence on a

¹⁰ 29 Car. II, c. 3, s. 1, 2, 3.

¹¹ Gilbert, Rents, 26; 2 Rolle, Abr. 449.

Coke, Litt. 47, a.

¹² Coke, Litt. 142, a.

¹³ Capel's Case, 1 Coke, 62, b; Coke, Litt. 47, a; Gilbert, Rents, 24.

¹⁴ Newman v. Anderton, 5 Bos. & P. 226. See Newton v. Wilson, 3 Hen. & M. V. 470; Mickie v. Wood, 5 Rand. Va. 574.

¹⁵ Tompkins v. Pinsent, 2 Ld. Raym. 819; 1 Salk. 141.

¹⁶ Gilbert, Rents, 48; Coke, Litt. 217.

¹⁷ See Hill v. Grange, Plowd. 171.

¹⁸ Menough's Appeal, 5 Watts & S. Penn. 432. Boyd v. McCombs, 4 Penn. St. 146.

particular day and to be paid three months in advance, such advance to be paid on taking possession, it was held that this advance was to be confined to the first quarter only; for if it had been the intention of the parties to make it payable in advance, it ought to have been said, "always payable in advance."²⁰

1672. As to the *time of day* when the rent becomes due, it is proper to observe this distinction. It becomes due for the purpose of making a demand to take advantage of a condition of re-entry, or to tender it to save a forfeiture, at sunset on the day on which it is due; but it is not actually due till midnight for any other purpose.²¹ A payment before midnight would be considered a voluntary payment, and the party entitled to receive it would not be bound by such payment made to a person not entitled at the time it ought to have been paid; for if the lessor died before midnight, the rent would go to his heir.²² As between the original parties themselves, the landlord could not maintain an action commenced on the day the rent became due, although it might have been commenced after sunset.²³

1673. When rent is payable yearly, and it is so reserved, it is to be paid on the land unless otherwise agreed upon, for the land is the debtor.²⁴

1674. Questions frequently arise, between the *executor* and the *heir* of the lessor, as to who is entitled to receive the rent. As a general rule, the rent which becomes due before the lessor dies belongs to his executor, and that which becomes due after, to his heir. It is when the lessor dies on the day when the rent is payable that the question arises. It has already been said that for certain purposes rent becomes due at sunset, but as between the heir and executor, if the lessor died after sunset, the former would be entitled to the rent. But it must be remembered that this rule applies only to the case of a lease made by a lessor seized in fee, or made by one under a power; in the case of a tenant for life it is different.

In two cases it has been held that the executor of a tenant for life would be entitled to the rent, although the lessor died before it was due; as, where A granted a rent charge to B, payable at Lady-day and Michaelmas, and B died on Michaelmas-day after sunset, it was held that as B lived till after sunset, which was the legal time for demanding the rent, though he died before twelve o'clock at night, it should go to the executor.²⁵ Again, where A, a tenant for life, remainder to his wife for life, made a lease reserving rent at Lady-day and Michaelmas-day, and died on the latter day at about twelve o'clock at noon, his administrator was held entitled to this rent.²⁶

The reason assigned by the court in these cases is this, that there is a difference between a rent incident to a reversion, which must go somewhere, if not to the executor, then to the heir, and where the rent can go nowhere, unless to the executor; in this latter case, if the lessor had lived to the beginning of the day, at which a voluntary payment might be made, this would be sufficient to entitle the executor or administrator to the rent, rather than it should be lost.

²⁰ *Holland v. Palser*, 2 Stark. 161.

²¹ *Duppa v. Mayo*, 1 Saund. 287; 2 Salk. 578; *Van Rensselaer v. Jewett*, 2 N. Y. 141; *Jewett v. Berry*, 20 N. H. 36.

²² 1 Saund. 287. But it seems such payment would be good against the heir. See *Clum's Case*, 10 Coke, 128; *Brownl.* 106; *Rockingham v. Penrice*, 1 P. Will. Ch. 177.

²³ See *Bank v. Wise*, 3 Watts, Penn. 401; *Wood v. Partridge*, 11 Mass. 493.

²⁴ Coke, Litt. 201, b; *Walter v. Dewey*, 16 Johns. N. Y. 222; *Burrough's Case*, 4 Coke, 73; *Hutt*, 115.

²⁵ 1 Wms. Saund. 288, n. (17); *Ballais v. Cole*, cited in *Rockingham v. Penrice*, 1 P. Will. Ch. 178.

²⁶ *Clum's Case*, 10 Coke, 127, b.

1675. By virtue of the English statute, II Geo. II, c. 19, s. 15, the principles of which have been re-enacted or adopted in this country with some modifications, when a tenant for life dies during the currency of a quarter or year, or other definite duration of time when the rent is payable, it shall be apportioned to the day of his death.

When the land is sold by virtue of judicial proceedings, the rent is apportioned.²⁷

1676. *Joint tenants* have each of them an estate in every part of the rent; each may therefore demand and receive the whole of the rent due, and give a discharge for it, and such a discharge is binding on his companions.²⁸

1677. Unlike joint tenants, *tenants in common* do not hold by one title and one right, but by different titles, and they have several estates; each is therefore entitled to receive his proportion of the rent,²⁹ unless, indeed, the thing to be paid for rent be an entire thing; as, to render a horse, in which case the thing being incapable of division, it must be paid to them jointly.³⁰

1678. When there is a subsisting obligation on the part of the tenant to pay a certain rent, the reversioner may sell his estate in different parts to as many persons as he may deem proper, and the lessee or tenant will be bound to pay each a proportion of the rent.³¹ The rule is the same when the lessor devises the rent to different persons in parts; as, where a testator owned a rent for thirty dollars, and he devised it to his three sons, one-third to each, it was held that each was entitled to his share, for which he might maintain an action.³²

Where the reversioner or owner of the rent releases a part of it to the tenant, he is entitled to receive the rest.³³

It is usual for the grantees to agree among themselves as to what part of the rent each shall have when there is nothing said in the grant as to the proportion to which each is entitled; in case of disagreement, the apportionment is to be made by the jury, who, upon evidence offered, are to judge of the value of the land purchased by the lessor or aliened by the tenant.³⁴

1679. *The right of the lessor to rent may be suspended* by his tortious acts; by his neglect to repair; by the destruction of the premises; and by eviction of the tenant.

1680. It is evidently unjust on the part of the lessor wrongfully to deprive the lessee of the thing let, and at the same time to claim the rent. Where the lessor, therefore, enters wrongfully into the demised premises, and the lessee is evicted from part of the same,³⁵ the tenant is discharged from the payment of the whole rent till he be restored to the whole possession,³⁶ for the lessor ought not to be able so to apportion his own wrong as to oblige the tenant to pay any thing for the residue.³⁷ When the entry is lawful, particularly when authorized

²⁷ 3 Kent, Comm. 470, 4th. ed. *Ryerson v. Quackenbush*, 2 Dutch. N. J. 236.

²⁸ 3 Salk. 17; *Robinson v. Hoffman*, 4 Bingh. 562; 3 Carr. & P. 234; 1 Moore & P. 474.

²⁹ *Harrison v. Barnby*, 5 Term, 246; *Crosby v. Loop*, 13 Ill. 625; *Van Rensselaer v. Gallup*, 5 Den. N. Y. 454.

³⁰ Coke, Litt. 197, a.

³¹ *Bank of Pennsylvania v. Wise*, 3 Watts, Penn. 404; *Farley v. Craig*, 6 Halst. N. J. 262; *Nellis v. Lathrop*, 22 Wend. N. Y. 121.

³² *Ards v. Watkins*, Croke, Eliz. 637.

³³ *Farley v. Craig*, 6 Halst. N. J. 263. See *Ingersoll v. Sergeant*, 1 Whart. Penn. 337.

³⁴ See *Hodgkins v. Robson*, 1 Ventr. 276; *Cuthbert v. Kuhn*, 3 Whart. Penn. 366; *McEl-derry v. Flannagan*, 1 Harr. & G. Md. 308; *Pallett's Case*, Brownl. 186; *Crosby v. Loop*, 13 Ill. 625; *Ryerson v. Quackenbush*, 2 Dutch. N. J. 236.

³⁵ *Dyott v. Pendleton*, 8 Cow. N. Y. 730; *Vaughan v. Blanchard*, 1 Yeates, Penn. 175; 4 Dall. 124.

³⁶ *Lewis v. Payn*, 4 Wend. N. Y. 423.

³⁷ *Smith v. Raleigh*, 3 Campb. 513; *Briggs v. Hale*, 4 Leigh, Va. 474; 1 Rolle, Abr. 940.

by the tenant himself, the rule is otherwise, and the rent shall be apportioned.³⁸

Any other act of misconduct by the landlord which justifies the tenant to leave the premises will deprive the lessor of the rent after such act.³⁹

1681. A mere trespass by the landlord will not, however, suspend the right to the rent.⁴⁰ But when the trespass has been an interference with or disturbance of the tenant's beneficial enjoyment of the premises, intentionally committed by the landlord and injurious in its character, it operates as a suspension of the tenant's liability to pay the rent, although there has been no physical eviction or expulsion.⁴¹

1682. Though in general the lessor is not bound to make repairs, yet if the tenant be exonerated from making them, and the premises become unsafe or unwholesome for want of them, a tenant from year to year may quit without previous notice, and he will not be liable for any rent after the occupation has ceased to be beneficial to him.⁴² But where the lease was for a term of years, with no agreement by the lessor to repair, and in the same writing the lessee agreed to pay a certain rent, and the property leased, (a wharf,) before entry by the tenant was destroyed by natural decay, the lessee was held liable for the rent agreed to be paid.⁴³

1683. When there is an express covenant on the part of the lessee that he will pay the rent he is bound to do so, although there may be a total or partial destruction of the premises, because a man is held bound by his contract, and he ought to have provided against such accidents by making an exception in such cases; ⁴⁴ nor does the fact that the landlord was fully insured, where the destruction was by fire,⁴⁵ alter the case. He will not be protected even by a court of equity.⁴⁶ The reason assigned for this is that the tenant loses his term and the lessor the residue by the accident, and that therefore the rule *res perit domino suo* applies in such case.⁴⁷

1684. If the tenant is *evicted* from the whole of the premises by a title paramount, he is not liable for any rent which is not then due, for the obligation to pay ceases when the consideration for it ceases, namely, the enjoyment of the land. The rent which was due before the eviction, however, must be paid.⁴⁸

When the eviction by title paramount is only partial the rent becomes apportionable, and the eviction is a bar *pro tanto*.⁴⁹

If the eviction of the whole or of a part be by the lessor, the rent is suspended for the whole, and the lessor can claim nothing until he has restored the premises to the tenant.⁵⁰ But a mere trespass will not have that effect.⁵¹

1685. The lessee by entering into a contract to pay the rent is always liable

³⁸ *Hodgkins v. Robson*, 1 Vent. 176; *Vaughan v. Blanchard*, 1 Yeates, Penn. 176; *Franciscus v. Reigart*, 4 Watts, Penn. 116.

³⁹ *Kirkham v. Jarvis*, 7 Dow, Parl. Cas. 678.

⁴⁰ *Bennett v. Bittle*, 4 Rawle, Penn. 339. ⁴¹ *Cohen v. Dupont*, 1 Sandf. N. Y. 260.

⁴² *Collins v. Barrow*, 1 Mood. & R. 112. See *Fairman v. Fluck*, 5 Watts, Penn. 517.

⁴³ *Hill v. Woodman*, 14 Me. 38.

⁴⁴ *Paradine v. Jane*, Al. 26; *Hallet v. Wylie*, 3 Johns. N. Y. 44; *Baker v. Holtzapfell*, 4 Taunt. 45; *Pollard v. Shaeffer*, 1 Dall. 210; *Wagner v. White*, 4 Harr. & J. Md. 564.

⁴⁵ *Magaw v. Lambert*, 3 Penn. St. 444.

⁴⁶ *Holtzapfell v. Baker*, 18 Ves. Ch. 115; *Hare v. Grove*, 3 Anstr. Exch. 687; *Lamott v. Sterret*, 1 Harr. & J. Md. 42.

⁴⁷ *Story*, Eq. Jur. § 102; *White v. Molyneux*, 2 Ga. 124.

⁴⁸ *Kessler v. Conachy*, 1 Rawle, Penn. 442; *Hemphill v. Eckfeldt*, 5 Whart. Penn. 278.

⁴⁹ *Stevenson v. Lambard*, 2 East. 576; 2 Wend. N. Y. 561; *Cuthbert v. Kuhn*, 3 Whart. Penn. 357.

⁵⁰ 1 Saund. 202, 204, n. 2; *Bennett v. Bittle*, 4 Rawle, Penn. 339; *Dyott v. Pendleton*, 8 Cow. N. Y. 730.

⁵¹ *Lansing v. Van Alstine*, 2 Wend. N. Y. 561; 4 Rawle, Penn. 339.

for it, notwithstanding he may assign all his rights to another,⁵³ because the privity of contract is not discharged.

1686. But when an assignee takes the lease, there is no personal covenant on his part to pay the rent, and he is responsible for it only as respects the land. When he sells the lease which he bought, his responsibility ceases as to all future rents, because then there is no privity between him and the lessor.

An executor is liable for rent accrued during the lifetime of his testator, whether he were the original lessee or an assignee, and the assets in his hands must be applied to discharge such rent. For rent accrued after the testator's death he is responsible, where the testator was the original lessee and became personally bound to pay the rent. If, however, the testator was a mere assignee, the executor may refuse to accept the property if he has not sufficient assets to pay the rent.⁵⁴

1687. The remedies for the recovery of rent are by distress, by re-entry, and by action; their consideration will be deferred until we come to treat of remedies.

1688. Having taken a view of rents, the next object of our consideration, as an incorporeal hereditament, is an annuity.⁵⁵ An *annuity* is a yearly sum of money granted by one party to another in fee, for life, or years, charging the person of the grantor only.⁵⁶ In a less technical sense, however, when money is chargeable on land and on the person, it is generally called an annuity.⁵⁶

An annuity is not infrequently confounded with a rent charge, but they differ in this: a rent charge is a burden imposed upon and issuing out of lands, whereas the annuity, technically speaking, is chargeable only upon the person of the grantee.⁵⁷

Annuities are usually classed with incorporeal hereditaments, because, when agreed to be paid to the annuitant and his heirs, it is a personal fee, and transmissible by descent like an estate in fee.⁵⁸

An annuity may be created by deed or by will.

1689. Difficulties occur frequently in consequence of the obscurity of the instrument creating the annuity, as to the time when it is to commence. The following rules have been adopted in relation to the subject:

When the time is distinctly stated, the annuity must of course be paid at that time.

When the testator directs the payment to be made at the end of the first quarter, or other period before the expiration of the first year after his death, it is then due, but in fact is not payable by the executor till the end of the year.

When the time is not appointed, as frequently happens in wills, the following distinction is presumed to exist: If the bequest be merely in the form of an annuity, as a gift to a man of "an annuity of one hundred dollars for life," the payment will be due at the end of the year after the testator's death; but if the disposition be of a sum of money, and the interest to be given as an annuity to the same man for life, the payment will not accrue till the end of the second year after the testator's death. The reason seems to be this—because the executor is entitled to hold the money for the first year without being charged with

⁵³ *Eaton v. Jacques*, 2 Dougl. 455.

⁵⁴ *Reid v. Ld. Tenterden*, 4 Tyrwh. Exch. 111.

⁵⁵ See generally, as to annuities, Bacon, *Abr. Annuity*; Comyn, *Dig. Annuity*; Doctr. Plac. 84; 1 Roper, *Legacies*, 588; Dane, *Abr. Annuity*; Viner, *Abr. Annuity*. Provisions are contained the civil code of Louisiana in relation to a peculiar kind of annuities known in that state. Art. 2764, *et seq.*

⁵⁶ Coke, *Litt.* 144; 1 Lilly, *Reg.* 89; 2 Sharswood, *Blackst. Comm.* 40; 5 Mart. *La.* 312.

⁵⁷ Doctr. & S. *Dial* 2, 230; Rolle, *Abr.* 226. See *Horton v. Cook*, 10 Watts Penn. 127.

⁵⁸ Bacon, *Abr. Annuity*, A.

⁵⁹ Coke, *Litt.* 2, a.

interest. This distinction, though stated from the bench, does not appear to have been sanctioned by express decision.⁶⁰

1690. A *franchise*⁶⁰ is a certain privilege conferred by grant from the government and vested in individuals.⁶¹ Franchises are usually created for the public benefit, and not for the individual advantage of any one. The most common are the grant of a right or privilege of making roads, bridges, establishing ferries, and taking toll for the use of the same.

They are generally granted to corporations, but instances are not wanting where the grant is made to a man and his heirs, and then clearly the right descends, and the estate is an incorporeal hereditament. In cases of this kind there is an implied agreement on the part of the government not to annul the grant unless for just cause.⁶²

There are two franchises, distinct in their nature, and yet governed by substantially the same rules as to grant and exercise, which may be enjoyed by a corporation. One is the franchise of being or existing as a corporation, that is, possessing a unity and perpetuity of existence, though composed of an aggregate of changing members; the other is the exercise of rights, like the right of eminent domain or the partial appropriation of public property by exclusive use, as in ferries. Either of these franchises is a branch of sovereignty.

⁶⁰ Gibson v. Bott, 7 Ves. Ch. 96, 97.

⁶¹ See as to Franchises, Cruise, Dig. tit. 27; 2 Sharswood, Blackst. Comm. 37; 3 Kent, Comm. 458, 4th ed.; Finch, 164; Crabb, Real Prop. §§ 623 to 732.

⁶² 2 Sharswood, Blackst. Comm. 37. Franchise has another sense; it is a right reserved to the people by the constitution; hence we say the elective franchise, to designate the right of the people to elect their officers.

⁶³ See Beekman v. Saratoga, 8 Paige Ch. N. Y. 45; Charles River Bridge v. Warren Bridge, 11 Pet. 420.

CHAPTER XVIII.

ESTATES OF INHERITANCE.

- 1691. The estate which may be had in real property.
- 1692. Legal estates.
- 1693. The quantity of legal estates.
- 1694-1712. Freeholds of inheritance.
- 1697. Fee simple.
- 1699. Qualified or base fee.
- 1700. Conditional fee.
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- 1704. Kinds of fees tail.
- 1705-1707. Estate tail, how created.
- 1706. In deeds.
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- 1708. Rights of tenant in tail.
- 1709. Incidents of an estate tail.
- 1710. Fee tail, how barred.
- 1711. Estates tail in the United States.
- 1712. Resemblance of the *fidei comissa* to entails.

1691. After having taken a general view of the nature of real property, corporeal and incorporeal, it will now be proper to ascertain what estate may be had in the same. These estates are of two kinds, namely, legal and equitable.

1692. A *legal estate* is one the right to which may be enforced in a court of law. It is distinguished from an equitable estate, which is grounded on the rules of courts of equity, and the right to which must necessarily be enforced in a court of equity. In the consideration of legal estates we will inquire into the quantity of the estates, the time of enjoyment, and the number and connection of the tenants.

1693. The word estate, in its most extensive sense, signifies every thing of which riches or fortune may consist, and includes personal and real property; thus, we say personal estate, real estate. In its more limited and technical sense, it is applied to lands. It is used in two senses. The first describes and points out the land itself, without ascertaining the nature or extent of the interest in it; as, "my estate in Philadelphia." The second, which is the proper and technical meaning of estate and the one in which it is here used, is the degree, quantity, nature, and extent of interest which one has in real property; as, an estate in fee, whether the same be a fee simple or fee tail; or an estate for life, for years, etc.

In Latin it is called *status*, because it signifies the condition or circumstances in which the owner stands with regard to his property.

The *quantity of interest* which a man has in his tenement is measured by its duration and extent. An estate considered in this point of view is said to be an estate of freehold and an estate less than freehold. Freehold estates are again divided into estates of inheritance and estates not of inheritance. Estates in fee are those of inheritance; those for life are not of inheritance.

Estates will be classified as freeholds of inheritance, estates of freehold, not of inheritance, estates less than freehold, and estates upon condition.

1694. *An estate of freehold* is defined by Britton to be "the possession of the soil by a freeman." This definition has been adopted by Blackstone.¹ But unless the word possession be considered as synonymous with ownership, every tenant for years would be a freeholder. An estate of freehold may more fully be defined to be an estate in lands or other real property, held by a free tenure for the life of the tenant or that of some other person, or for some uncertain period, or for ever.

It is called *liberum tenementum*, frank-tenement or freehold; it was formerly described to be such an estate as could be created only by livery of seisin, a ceremony similar to the investiture of the feudal law. But since the introduction of certain modern conveyances, by which an estate of freehold may be created without livery of seisin, this description is not sufficient.

1695. There are two qualities essentially requisite to the existence of a freehold estate:

1st. Immobility; that is, the subject matter must be either land, or some interest issuing out of and annexed to land.

2d. A sufficient legal indeterminate duration; for if the utmost period of time to which an estate can last is fixed and determined, it is not an estate of freehold. For example, if lands are conveyed to a man and his heirs, or for his life, or for the life of another, or until he shall be married, or go to Europe, he has an estate of freehold; but if such lands are limited to a man for one hundred or five hundred years, he has not an estate of freehold.²

1696. *A fee* is an estate in land which may continue for ever. The word fee is explained to signify that the land, or the subject of property, belongs to its owner, and is transmissible, in the case of an individual, to those whom the law appoints to succeed him under the appellation of heirs; and in case of corporate bodies, to those who are to take on themselves the corporate function, and, from the manner in which the body is to be continued, are denominated successors.³

By the English common law the true meaning of the word fee (*feodum*) is the same with that of feud or fief, and in its original sense it is taken in contradistinction to allodium. By *allodium* is meant an absolute estate of inheritance in contradistinction to a feud. Allodial lands were those of which the owner had the *dominium directum et verum*; the complete and absolute property, free from all services to any particular lord. *Allodium proprietatis quæ a nullo recognoscitur. Tenere in allodium id est in plenam et absolutam proprietatem. Habet integrum et directum dominium, quale a principio de jure gentium fuit distributum et distinctum.*⁴ In this country the title to land is essentially allodial, and every tenant in fee has an absolute and perfect title; yet in technical language his estate is called an estate in fee simple, and the tenure free and common socage. Remembering the sense in which these terms are used, it will be more convenient, as well as more intelligible, to employ the established technical language to which we have been accustomed than to adopt one with which we are not familiar.

In the sense in which it is now used in this country, a fee is an estate of inheritance at law, belonging to the owner of the land and transmissible to his heirs.

One of the most essential requisites to a fee is that the estate shall continue for ever. An estate whose duration is limited by the period of one or more

¹ 2 Sharswood, Blackst. Comm. 104.

² Cruise, Dig. t. 1, § 13, 14, 15; Litt. § 59; Coke, Litt. 42, a.

³ Coke, Litt. 471, b; 2 Sharswood, Blackst. Comm. 104 to 106; Wright, Ten. 147, 150.

⁴ Dumoulin, art. 46, n. 1.

lives in being is merely a freehold, and not a fee; for example, a limitation to Titius and his heirs during the life or widowhood of Titia is not an inheritance in fee, because the determining event must necessarily take place within the period of a life.⁵

Fees are divided into fee simple; qualified or base fees; conditional fees; and fees tail.

1697. A *fee simple* is a pure inheritance, and in reference to the ownership of individuals is not restrained to any heirs in particular, nor subject to any condition or collateral determination, except by the laws of escheat and the canons of descent, by which it may be qualified, abridged, or defeated.⁶ The words *fee simple* are sometimes used by the best writers on law as contrasted with *estates tail*.⁷ In this sense the term comprehends all other fees as well as the estate, which, in strict propriety of technical language, is properly distinguished by this appellation.

The law annexes to every estate and interest in lands, tenements, and hereditaments, certain peculiar incidents, rights, and privileges, which in general are so inseparably attached to those estates that they cannot be restrained by any proviso or condition whatever.

1698. The several incidents of an estate in fee simple are the following:

The owner has an unlimited power of alienation; any restriction of this power annexed to the creation of an estate in fee simple would, therefore, be absolutely void.

This unlimited power of alienation comprises in itself all inferior powers; a tenant in fee simple may therefore create any inferior estate or interest out of his own; as, if one grant a lease for twenty-one years, the fee remains vested in him and his heirs, and, after the determination of the term, the land reverts to the grantor and his heirs, who shall hold it again in fee simple. When there is no one entitled to take the fee at the determination of the term, then the estate is said to be in *abeyance*, that is, in expectation, remembrance, or contemplation of law. For example, where an estate is limited to A for life, remainder to the right heirs of B, the fee simple is in *abeyance* during the lifetime of B, because it is a maxim of law that *nemo est hæres viventis*.⁸

At common law an estate in fee simple will descend to the heirs general of the person last seised of it. It is for this reason that the word *simple* is added to the word *fee*, importing an absolute inheritance, clear of any condition, limitation, or restriction to particular heirs. And in all cases it is required in a deed that the grant should be to the grantee and his heirs for ever in order to create a fee simple to an individual.⁹ But a grant to a corporation for ever, without mentioning successor, will be good, because in contemplation of law a corporation never dies.¹⁰ In wills, where the intention to devise a fee simple is clear, it is sufficient to create it. But in several states of the Union these inflexible rules have been either entirely abolished or greatly qualified, and an estate in fee may be created, where it is manifestly the intention of the parties, without the word heirs.¹¹

⁵ Chudleigh's Case, 1 Coke, 140, b.

⁶ Coke, Litt. 1, 6; Plowd. 557; Hale, Analysis, 74.

⁷ Coke, Litt. 19.

⁸ 2 Sharswood, Blackst. Comm. 107; 1 Cruise, Dig. t. 1, h. 47; 1 Viner, Abr. 104, *Abeyance*; Merlin, Repert. *Abeyance*; Coke, Litt. 342.

⁹ Roberts v. Forsythe, 3 Dev. No. C. 26

¹⁰ Coke, Litt. 9, b.

¹¹ Alabama, Code 1852, § 1299; Arkansas, Rev. Stat. 1837, Ch. 31, § 3; Georgia, Rev. Stat. 1848, p. 109, § 32; Illinois, Rev. Stat. 1856, part I., p. 156; Iowa, Code 1851, p. 191; Kentucky, Rev. Stat. 1834, p. 443; Maryland, Code, art. 24, § 11; Mississippi, Rev. Stat. 1840, Ch. 34, § 23; Missouri, Rev. Stat. 1855, p. 355; New York, Rev. Stat. 4th ed. 1852, vol. 2, p. 155; Tennessee, Stat. 1851; Cromwell v. Winchester, 2 Head, Tenn. 389; Texas, Hartley, Dig. 129; Virginia, Tate, Dig. p. 174, § 27; 2 Washburn, Real Prop. 29.

Estates in fee simple are subject to curtesy and dower.

1699. A *qualified or base fee*, which is sometimes also called a determinable fee, is one which has a qualification subjoined to it, and which must be determined whenever the qualification annexed to it is at an end. A limitation to a man and his heirs on the part of his father affords an example of this species of estate.¹² A further example may be found in the case of a grant to A and his heirs, tenants of the manor of Dale; in this case, as soon as the heirs of A cease to be tenants of the manor of Dale, the grant is entirely defeated.¹³

The proprietor of a qualified or base fee has the same rights and privileges over his estate, till the qualification upon which it is limited is at an end, as if he were a tenant in fee simple.

1700. A *conditional fee* is a limitation of an estate to some particular heirs of the grantee exclusive of others; as, for example, the heirs of his body, or the male heirs of his body. This kind of limitation was originally unknown at common law. At an early period it came into very extensive use, and was much encouraged by the judges. It was construed to differ from a fee simple only in the following particulars, namely: that its duration beyond the life of the donee depended upon his having issue, and that when this condition was fulfilled, it became liable to alienation, forfeiture, and incumbrance, like an absolute estate.

It was the practice immediately on the birth of issue, when the condition was performed, to alienate the estate, and afterward buy it again free from any condition by which the donor was defeated of his expectancy.¹⁴ When, however, the donee died without having issue, or when his issue died without issue and not having alienated, the donor might re-enter for breach of condition.

1701. By the influence of the English nobility the statute of Westminster 2, 13 Edw. I, entitled "*De donis conditionalibus*," was passed. By this act the persons to whom the above-named estates are conveyed are forbidden to bar their issue, and the donor by alienation. It provides that if the donee die leaving issue, they shall take the estate, but if he die leaving no issue, or upon any future failure of lineal heirs of which the class is limited, it shall return back to the donor and his heirs.

In construing this statute the judges determined that where an estate was limited to a man and the heirs of his body, the donee should not in future have a conditional fee, but divide the estate by creating a particular estate in the donee, called an estate tail, subject to which the remainder in fee remained in the donor.¹⁵ Where the donee had a fee simple before, by the statute he had only an estate tail; and where the donor had before but a bare possibility, by the construction of the statute, he had a reversion or fee simple expectant upon the estate tail.

1702. In the examination of *estates tail* we will consider what is a fee tail, the different kinds of fees tail, how they are created, the rights of the tenant in tail, the incidents to an estate tail, how they are barred and destroyed, the law

¹² Litt. § 254; Coke, Litt. 27, a, 220; 1 Preston, Est. 149; 2 Sharswood, Blackst. Comm. 109; Cruise, Dig. t. 1, § 82, *et seq.*

¹³ 2 Sharswood, Blackst. Comm. 109.

¹⁴ It is remarkable that precisely the same case and decision are to be found in the Roman law of *fidei commissary donations*. The rule of the civil law in these cases is that *qui sunt in conditione positi, non concentur in testamento vocati*; and that rule is applied as well to acts *inter vivos*, as to testaments, upon the ground stated in the text, namely, that the condition had a suspensive effect, and that its performance by birth and issue rendered the estate of the donee absolute. Voet, Com. ad Pand. lib. 28, t. 2. *De Liberis et Postliminis Instituentis*, num. 9.

¹⁵ 2 Inst. 335; Plowd. 248; 1 Burr. 115.

the United States as regards fees tail, and the resemblance of the *fidei commissa* of the Roman law to entails.¹⁶

1703. *An estate tail* is described to be an estate of inheritance, created by the statute *de donis*, which is descendible to some particular heirs only of the person to whom it is granted, and not to his heirs in general.¹⁷

The statute restricts an estate tail in three ways, namely: that the intention of the donor expressed in the will or deed shall be observed, that the fee so given shall go to the issue if there be any, and for want of such issue, shall revert to the donor, by this means taking away the power of alienating exercised by the donees of conditional fees, before the passage of the statute *de donis*, so as to bar their issue, and the reverter to the donor; by the common law, after the issue had, the land became descendible to all the heirs of the donee's body, whether they were of the donee's issue by the person named in the gift or by any other person; and also liable to the curtesy or dower of the husband or wife; but the statute provides that the issue of the second marriage shall not inherit. The second husband is not entitled to curtesy nor the second wife to dower.¹⁸

1704. Estates tail, as qualified in their limitation and extent, are of several sorts. They have different denominations, according to the circumstances under which, or the persons to whom they are limited. They are usually divided into estates tail general and special.

An estate tail general is where lands are given to a man and the heirs of his body begotten generally, without defining to which of those heirs in particular, and it is so called because it extends to all the issue or descendants of a man generally, of whatever woman begotten, who are capable of inheriting the estate *per formam doni*;¹⁹ in the same manner, when lands are given to a woman and the heirs of her body, such a gift is called a general tail; for though she may take divers husbands, yet her issue by all of them may inherit as issue in tail.²⁰

An estate tail special is where the estate is limited to some particular heirs of the body of the donee, as, to "his heirs by Anna, his present wife," instead of being limited to all the heirs generally.

Estates tail may not only be limited to the descendants of a particular woman, but also to the particular descendants of such woman; as, for example, to the heirs male, when the estate is called an estate in tail male, and in such case females cannot inherit; or it may be given to a person and his heirs female, when the estate is called an estate in tail female, to which males cannot inherit.

In cases of special tails, to entitle a descendant to claim he must have his title through that particular description of heirs to which the succession of the land was first limited.²¹

1705. In regard to the creation of an estate tail, as in the case of a fee simple, there is a distinction between the requisites in deeds and in wills. The words which may be sufficient in a will are insufficient in many cases in a deed.

1706. In deeds an estate tail ought to be limited to a man and the heirs of his body, for if it be limited to his issue, only a life estate is conveyed to him. The word heirs is indispensable.²² But the word heir, in the singular number,

¹⁶ See in general, as to estates tail, Bacon, *Abr. Estates in Tail*; Comyn, Dig.; Viner, *Abr.*; Crabb, *Real Prop.* § 970 *et seq.*; Preston, *Est.* 355; Cruise, Dig. t. 2, c. 1, s. 12; 4 Kent, Comm. 12, 4th ed.

¹⁷ Preston, *Est.* 355; Cruise, Dig. t. 2, c. 1, s. 12.

¹⁸ Willion v. Berkley, Plowd. 247; Paine's Case, 8 Coke, 35.

¹⁹ Litt. § 13, 14.

²⁰ Litt. § 24.

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²¹ Litt. § 14, 15.

²² Coke, Litt. 20.

may, in a special case, create an estate, if such appears to have been the intention of the donor, for the word heir is *nomen collectivum*.²³

The words of the body are the proper words to be used, but they are not strictly required, and may be expressed by other words amounting to the same thing; as, "to a man and his heirs which he shall beget of his wife;" "to a man *et hæridibus de carne sua*;" "to a man *et hæridibus de se*," are sufficient.²⁴ And the words "begotten," or "to be begotten," will make a good estate tail.

1707. *In wills* an estate tail may be created by words which would be insufficient in a grant. A devise to a man and his issue will make an estate tail, though he has no issue alive; for words in a will which indicate the testator's intention to restrain the descent of the estate given to the lineal descendants of the devisee give an estate tail, for the law supplies the words, of his body, and makes it an estate tail.²⁵ A devise to a man and his children, he having no children at the time, will make an estate tail.²⁶ And, indeed, in a will an estate tail may arise by mere implication.²⁷

1708. The tenant in tail, being master of the inheritance, has power over all the lasting improvements growing on it, so that he may cut down timber trees, and dispose of them as he pleases, without barring the entail; but they must be removed by the buyer before the tenant's estate is determined.

In general, the tenant in tail is dispunishable for waste; he may, therefore, pull down houses, open mines, and do all other acts of ownership, like a tenant in fee simple.²⁸

By virtue of the statute 32 H. VIII, c. 2, the tenant in tail may make a lease by writing indented under seal, for years or life, and it shall be good against the lessor and his heirs as if he had been seised in fee simple, but a lease under the statute must be by indenture; and in point of duration it cannot exceed three lives or twenty-one years.

1709. *The incidents of an estate tail* are various:

One of the principal incidents of an estate tail is to vest in the tenant in tail the right to use the inheritance as if he had a fee simple.

The estate in tail is subject to the curtesy of the husband and the dower of the wife.

An estate tail cannot be merged, surrendered, or extinguished by the accession of the fee simple to the tenant in tail, so that he may have in his own right at the same time both an estate tail and the immediate reversion in fee in the same lands.²⁹

The estate tail may be barred or destroyed by a fine or common recovery.

1710. The inconveniences arising from these fettered inheritances were felt in England, and their injurious effects on the national industry and commerce were observable. But the landed aristocracy always opposed any amelioration of this destructive policy. What the parliament refused to do was accomplished by a bold and before unexampled stretch of the power of judicial legislation. In the twelfth year of the reign of Edward IV the judges, upon consultation, resolved that an estate tail might be cut off or barred by a common recovery, and that, by reason of the intended recompense, the common recovery was not within the restraint of the statute *de donis*.

These recoveries are now considered simply in the light of a conveyance on

²³ 1 Rolle, Abr. 233; Ambl. Ch. 463; Godb. 155; T. Jones, 111; 2 Preston, Est. 9, 10; 1 Ventr. 228; 10 Viner, Abr. 233, pl. 1.

²⁴ Coke, Litt. 20, b.

²⁵ Brooke, Abr. *Devise* 1; Coke, Litt. 9, 25, 27; Gilbert, Dev. 32.

²⁶ See *Nightingale v. Burrell*, 15 Pick. Mass. 104.

²⁷ *Webb v. Hearing*, Croke, Jac. 415.

²⁸ Plowd. 259; 3 Leon. 121.

²⁹ Plowd. 296.

record, invented to give the tenant in tail an absolute power to dispose of his estate as if he were a tenant in fee simple. These estates tail, being by degrees thus unfettered, are now reduced to the same estate as conditional fees were at common law, even before the birth of issue.³⁰

1711. With other parts of English law estates tail were introduced into this country, and they subsisted as in England, before our Revolution, with the right of barring them by fines and common recoveries as in that country. But being opposed to the spirit of our institutions, they were soon modified in many of the states, and in others they were wholly abolished by statutes which either converted them into fees simple or gave an easy mode of barring them. In some they never existed.

The technical conditional fees at common law, as known and defined prior to the statute *de donis*, are no more favored than estates tail.³¹

1712. A resemblance has been imagined between the *fidei commissa* of the civil law and entails, though some writers have declared that the Roman law was a stranger to the system of entails.

Every *fidei commissum* is a species of substitution, though it differs from a substitution strictly so called, inasmuch as it is an obligation or trust imposed on a person binding him to give or to do something for another.

³⁰ 2 Sharswood, Blackst. Comm. 120.

³¹ The rules in the different states may be briefly stated as follows: *Alabama*, fees tail are converted into fees simple in the hands of the donee. Code, § 1300. *Arkansas*, the tenant in tail is made tenant for life, with remainder in fee simple to the person to whom at common law the estate would first descend. Rev. Stat. 1838, Ch. 31, § 5. *California*, the constitution prohibits perpetuities. Const. art. 11, § 16. *Connecticut*, the issue of the first donee in tail takes an absolute fee simple. Comp. Stat. 1854, p. 630, § 4. *Delaware*, estates tail may be barred by fine and common recovery or by deed. Rev. Code, 1852, Ch. 83, §§ 26, 27. *Florida*, entails are prohibited. Thompson, Dig. 2d Div. tit. 2, Ch. 1, § 4. *Georgia*, the donee takes a fee simple. Cobb, Laws, 1851. *Illinois*, the tenant in tail is tenant for life, with remainder in fee simple to the person to whom at common law the estate would first descend. Rev. Stat. 1855, Ch. 15, § 6. *Indiana*, estates tail are abolished, and if no valid remainder is limited upon what is in form an estate tail, the tenant has a fee simple. *Iowa*, all limitations are void which suspend the absolute power of alienation longer than lives in being and twenty-one years. Rev. Code, 1851, § 1191. *Kentucky*, the donee takes a fee simple. Rev. Stat. 1851, 1852, Ch. 80, § 8. *Maine*, tenant in tail may convey in fee simple. Rev. Stat. 1857, Ch. 73, § 4. *Maryland*, donee may convey in fee simple, and the estate will descend like a fee simple. Chelton v. Henderson, 9 Gill, Md. 438. *Massachusetts*, tenant in tail may convey estate in fee simple by deed in common form. Gen. Stat. Ch. 89, § 4. *Michigan*, estates tail are abolished, and if no valid remainder is limited upon what is in form an estate tail, the tenant has a fee simple. Rev. Stat. 1846, Ch. 62, § 3. *Mississippi*, estates tail are prohibited and declared to be estates in fee simple, except that estates may be limited to a succession of donees then living, not exceeding two, and to the heirs of the body of the remainder-man, and in default thereof to the heirs of the donor in fee simple. Rev. Code, 1857, Ch. 36, § 1, art. 3. *Missouri*, tenant in tail takes an estate for life, remainder to his children in fee in common. Rev. Stat. 1845, Ch. 32, § 5. *New Hampshire*, tenant in tail may convey in fee simple by deed in common form. Comp. Stat. 1853, Ch. 135, § 1. *New Jersey*, donee has an estate for life, and a fee simple vests in his heirs. *New York*, estates tail abolished, and if no valid remainder is limited thereon the tenant in tail takes a fee absolute. 2 N. Y. Rev. Stat. 4th ed. p. 132, § 3. *North Carolina*, donee is seised in fee simple. Code, 1854, Ch. 43, § 1. *Ohio*, the issue of the first donee in tail takes a fee simple absolute. Rev. Stat. 1854, Ch. 42, § 1. *Pennsylvania*, estates tail may be barred by deed expressing an intent so to do. Dunlop, Laws, p. 206. *Rhode Island*, tenant in tail may bar entail by deed or devise by limiting a fee simple to his grantee or devisee, the deed to be acknowledged before the Supreme Court or Common Pleas. Rev. Stat. 1857, Ch. 151, § 21. *South Carolina*, the estate is conditional as at common law prior to the statute *De Donis*. 3 So. C. Stat. 341. *Tennessee*, the donee is seised in fee simple. *Texas*, entailments are of no force. Const. art. 1, § 18. *Vermont*, the donee takes estate for life, remainder in fee simple absolute to him to whom the estate would pass upon his death. Comp. Stat. 1850, ch. 61, § 1. *Virginia*, estates tail were abolished as early as 1776. *Wisconsin*, the donee takes a fee simple. 4 Kent, Comm. 5, n; 1 Washburn, Real Prop. 85, n.

When a testator was desirous of disposing of his estate so that it should descend in the family of the donee without power of alienation, he gave it to one who was called the institute, requesting him to give it to some other person mentioned by the testator, who was called the substitute. Thus, one person was substituted for another by *fidei commissum*, so that the second should receive the property after its having been enjoyed, even during life, by the other.

In the same manner that one person may be requested to transmit the property to another, the second may be made a trustee for a third, and again the third for a fourth, and so on to any number of substitutes. And as alienation by any of the *fidei commissaries* is a breach of trust, this species of disposal of property produces something resembling what an estate tail was by the English law before any means were invented to break entails. But this analogy did not exist until a legal remedy was provided to enforce the obligation of the fiduciary or trustee.³²

³² Mr. Chancellor Kent, in his learned Commentaries, seems to be of opinion that these substitutions could not extend beyond the fourth generation, and that they were so limited by the 159th Novel of Justinian, Ch. 2. But, as is well observed by Bowyer in his Commentaries on the Modern Civil Law, p. 152, "That celebrated law was framed to provide for the case of a private family, so that it cannot be interpreted as a general law." See what is said in Coke, Litt. 191, a, note 1. Pothier, who is so remarkable for his great accuracy, is of the same opinion. He says, "Le Droit Romain donnait une faculté indéterminée de faire autant de degrés de substitutions fidéi commissaires que bon lui semblait, et la substitution avait son effet dans tous ces degrés." *Traité des Substitutions*, sec. 7, art. 4. Chancellor Kent (Com. 21, note) says, in reference to what has just been quoted, "Pothier, very loosely, and without any reference to authority, says that the Roman law allowed entails to an indefinite extent." Pothier, however, is supported fully by Merlin in his *Répert. de Jurisp. verbo Substitution fidéi commissaire*, sect. 10, § 4, art. 2; by Peregrenus, *De Fidei Commis.*, art. 30, n. 17; and by Mantica, *De Conjecturis Ultimarum, Voluntatem*, lib. 8, tit. 13, n. 57. These substitutions have been adopted in many of the codes of continental Europe, and found inconvenient as fettering estates unnecessarily. They have been subjected to restraint in some countries, and in others they have been totally abolished. Bowyer, *Mod. Civ. Law*, 154; Code Civil, art. 896. The Civil Code of Louisiana, copying this article of the Code Civil, art. 1507, declares that "substitutions and *fidei commissi* are and remain prohibited."

The Mussulman code has adopted this system of substitution under the name of *hobouss*. The *hobouss* does not establish any inequality among the members of the family; it respects scrupulously the legitimate rights of all the heirs, according to the legal order of succession; but the property cannot be alienated till the extinction of the race; it is a true infeudation. The *hobouss* is established by a written instrument, the constituent reserving the *dominium utile* for himself and his descendants until the extinction of the race, and the direct domain is given to the mosque. By this means, the estate is completely entailed in the giver's family. *Droit, Civil Mussulman*, 273, 274.

CHAPTER XIX.

ESTATES FOR LIFE.

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1713. Having treated of the estates of freehold of inheritance, namely, estates in fee simple, base or qualified fees, conditional fees, and fees tail, we will next consider the legal estates of freehold not of inheritance, or estates for life.¹

Estates for life are of five kinds; the first is created by the acts of the parties, the others by operation of law; they are, those which are created by deed or other lawful assurance, and which are properly conventional, curtesy, dower, jointure, and estate tail after possibility of issue extinct, which are legal life estates.

1714. *An estate for life* is a freehold interest in lands the duration of which is confined to the life or lives of some particular person or persons, or to the happening or not happening of some uncertain event.

The life estate may be either for the man's own life, or for the life of another person; in the first case it is called simply an estate for life; in the latter, an estate *pur autre vie*. There may be a third kind, where the term is for a man's own life and also another man's life; as, if a lease was made during a man's own life and also during the lives of B and C. In this case the estate is not exhausted until the death of the last survivor.²

There are some estates for life which may depend upon future contingencies before the death of the person to whom they are granted; for example, an estate given to a woman *dum sola fuerit*, or *durante viduitate*, or to a man and woman during coverture, or as long as the grantee shall dwell in a particular house.

A lease for five hundred years, although longer than any life can possibly last, is not a life estate, but an estate for years.³

1715. *An estate for life may be created* by express words; as, if Primus conveys land to Secundus for the term of his natural life. This is the simplest mode. Or they may be devised by the owner's last will.

They may also arise by construction of law; as, when Primus conveys land to Secundus without specifying the term or duration, and without words of limitation. In this last case, Secundus cannot have an estate in fee, according to the English law, and according to the law of those parts of the United States which have adopted and not altered the common law in this particular, but will take the largest which can possibly arise from the grant, and that is a life estate.⁴

1716. Not only lands and tenements and all corporeal hereditaments are the subjects of an estate for life, but also all incorporeal hereditaments.⁵ A man may therefore have a life estate in a rent charge.

1717. *A tenant for life has various rights*, the principal of which are the following:

A tenant for life has a right to the full use and enjoyment of the land, with all its profits, during the continuance of his estate.

He may alienate the whole of his interest, or create any less estate out of it, unless restrained by some condition.⁶

¹ See in general as to estates for life, 3 Saund. 338, h, note; 1 Hov. Suppl. to Ves. Jr. 371 to 381; Bacon, Abr. *Estates for Life*; Comyn, Dig. *Estates*.

² Dale's Case, Croke, Eliz. 182.

³ Coke, Litt. 42.

⁴ Coke, Litt. 42, a; see *Gray v. Packer*, 4 Watts & S. Penn. 17.

⁵ Coke, Litt. 42, a.

⁶ *Wittingham's Case*, 8 Coke, 44; Coke, Litt. 42; *Jackson v. Van Hoesen*, 4 Cow. N. Y. 325.

In England the tenant for life has not in general the right to cut down timber trees, unless he is entitled to hold without impeachment of waste. But a distinction has been made between the situation of this country and that of England. It is frequently for the benefit of the reversioner or remainder-man that the land should be cleared, and, in these cases, the tenant for life would be authorized to cut down timber.⁷

In general, the tenant for life cannot commit any wilful waste to the buildings, and pulling them down is considered waste.⁸

In ordinary cases a tenant for life cannot open a mine,⁹ but the law appears to be otherwise with a tenant for life *sans waste*.¹⁰ No permanent injury to the remainder-man will be allowed, and for that reason a tenant for life will not be permitted to dig up the soil and make bricks for sale, nor use wood for that purpose.¹¹

1718. *The tenant for life is bound to keep down the interest of all incumbrances affecting the inheritance.* And he is bound to apply the rents and income not only to pay the interest which accrued and became due during the time he had possession, but also of all interest which was due and unpaid before the commencement of his life estate.¹² He is also bound to pay the taxes.¹³

1719. *The incidents to an estate for life, whether conventional or legal, are the following:*

A tenant for life, unless restrained by agreement, has a right to take upon the

⁷ *Givens v. McCalmont*, 4 Watts, Penn. 463; *Hastings v. Crunkleton*, 3 Yeates, Penn. 261; *Jackson v. Brownson*, 7 Johns. N. Y. 238; *Den v. Kinney*, 2 South. N. J. 552; *Parkins v. Coxe*, 2 Hayw. No. C. 339. The question in this case is whether it is in conformity with good husbandry to clear the land or cut off the timber or a portion of it. This question is to be answered in view of the custom of farmers, the situation of the country and the value of the timber. *Morehouse v. Coltreall*, 2 N. J. 521; *McGregor v. Brown*, 10 N. Y. 118; *Keeler v. Eastman*, 11 Vt. 293; *McCullogh v. Irvine*, 13 Penn. St. 438; *Proffit v. Henderson*, 29 Mo. 327; *Davis v. Gilliam*, 5 Ired. Eq. No. C. 311; *Padelford v. Padelford*, 7 Pick. Mass. 162; and the uses to which the land has been appropriated. *Den v. Kinney*, 2 South. N. J. 552; *Findlay v. Smith*, 6 Munf. Va. 134; *Ballentyne v. Payner*, 2 Hayw. No. C. 110; *Clemence v. Steere*, 1 R. I. 272. In some states a widow is not dowable of wild lands. *Conner v. Shepherd*, 15 Mass. 164; but where she is, she may clear a reasonable proportion for cultivation. *Hastings v. Crunkleton*, 3 Yeates, Penn. 261; *Findlay v. Smith*, 6 Munf. Va. 134; *Alexander v. Fisher*, 7 Ala. 514; *Parkins v. Coxe*, 2 Hayw. No. C. 339; *Owen v. Hyde*, 6 Yerg. Tenn. 334.

⁸ *Cruise*, Dig. t. 8, c. 2, § 13; *Coke*, Litt. 53, a.

⁹ *Coates v. Cheever*, 1 Cow. N. Y. 460; *Cranch v. Puryear*, 1 Rand. Va. 258. It is said that where lands are chiefly valuable for minerals this rule does not apply. *Smith, Landl. & T.* 192; *Morris*, note. And it is not waste for the tenant to work the mine to exhaustion. *Neel v. Neel*, 19 Penn. St. 324; *Stoughton v. Leigh*, 1 Taunt. 410; or to open new shafts to reach a vein already open. *Coates v. Cheever*, 1 Cow. N. Y. 460; *Billings v. Taylor*, 10 Pick. Mass. 460; *Findlay v. Smith*, 6 Munf. Va. 134; *Kier v. Peterson*, 41 Penn. St. 361.

¹⁰ *London v. Webb*, 1 P. Will. Ch. 528.

¹¹ *Livingston v. Reynolds*, 2 Hill, N. Y. 157. But if the land has been used for a gravel or clay pit he may continue such use. *Huntley v. Russell*, 13 Q. B. 591.

¹² *Tracy v. Hereford*, 2 Brown, Ch. 128; *Penryn v. Hughes*, 5 Ves. Ch. 99; *Dorrance v. Scott*, 3 Whart. Penn. 313. He is bound to apply the amount of the rents accruing, or if obliged to do more, will be a creditor for the excess. *Kensington v. Bouverie*, 31 Eng. L. & Eq. 345; see *Davies v. Myers*, 13 B. Monr. Ky. 511; *Mosely v. Marshall*, 27 Barb. N. Y. 42. The rule of contribution between the tenant and reversioner where the tenant is obliged to do more than keep down interest, as, for example, in redeeming from an overdue mortgage, is this: The tenant shall contribute beyond the interest in proportion to the benefit he derives from the liquidation of the debt and the consequent cessation of annual payments of interest during his life. *Story*, Eq. Jur. § 487; see *Swain v. Perrine*, 5 Johns. Ch. N. Y. 482; *Gibson v. Crehore*, 5 Pick. Mass. 146; *House v. House*, 10 Paige, Ch. N. Y. 71; *Abercrombie v. Riddle*, 3 Md. Ch. 324; *Dorsey v. Smith*, 7 Harr. & J. Md. 367; *Foster v. Hilliard*, 1 Stor. C. C. 87.

¹³ *Varney v. Stephens*, 22 Me. 331; *McMillan v. Robins*, 5 Ohio, 28.

land demised reasonable estovers or botes.¹⁴ But he has no right to cut down timber trees to the permanent injury of the inheritance, as has been already observed.

The right of the tenant for life to estovers is distinct from the right of common of estovers, which is appendant or appurtenant to a house.

When the determination of the estate is contingent or uncertain, the tenant for life, or his representatives, are not prejudiced by such sudden determination of the rights of the tenant for life. In such case he is entitled to reap the harvest where he has sown the land; he is entitled to what the law calls emblements.¹⁵ And in case the tenant holds *per autre vie*, and the person on whose life the estate depends, who is called the *cestui que vie*, happens to die, the tenant shall have the crop or emblements which he has sown. It makes no difference in this respect whether the estate be determined by the act of God or by act of law; an example of the latter case is found where a lease is made to husband and wife during coverture, and afterward they are divorced, the husband shall have the emblements.¹⁶ But where the estate is determined by the acts of the tenant for life, he is not entitled to the emblements.¹⁷

On the termination of the life estate his under tenants have the same rights he would have had if the estate had remained in him, and even greater, for if the tenant for life should terminate the estate by his own act, that will not injuriously affect the under tenant, who will be entitled to the emblements as if it had been terminated by act of God or by act of law. For example, if a woman hold land *durante viduitate* and lease it, and then marries, the under tenant would be entitled to the emblements, although she could not have claimed them;¹⁸ the reason is, that the under tenant shall not be affected by the acts of the widow, which he could not prevent.

1720. Having treated of conventional estates for life, we will now consider life estates which arise by operation of law. These are curtesy, dower, jointure, and an estate in tail after possibility of issue extinct.

1721. An estate by the curtesy is called by Littleton an estate by the curtesy of England, because, according to him, it is peculiar to that country.¹⁹ This is evidently an error; for it is found, with some modification, it is true, in the ancient and modern laws of Scotland,²⁰ in the old laws of Ireland, Normandy, and Germany. In France there were several customs before the enactment of the code civil which gave a somewhat similar estate to the surviving husband out of the wife's inheritances.²¹

An estate by curtesy is an estate for the duration of his life, to which a husband is entitled upon the death of the wife, in the lands or tenements of which she was seised in possession in fee simple or fee tail during her coverture, provided they have had lawful issue born alive which might have been capable of inheriting the estate.²² It is an estate of freehold, and is said to be initiate upon the birth of a child and consummate upon the death of the wife. It is in many respects considered as a continuance of the estate of the wife, though an estate by descent rather than purchase.²³

¹⁴ See before, 1656-1661. *Loomis v. Wilbur*, 5 Mas. C. C. 13; *Elliot v. Smith*, 2 N. H. 430.

¹⁵ Emblements have been considered before, 1582.

¹⁶ *Oland's Case*, 5 Coke, 116.

¹⁷ Coke, Litt. 55.

¹⁸ *Croke, Eliz.* 461.

¹⁹ Litt. § 35.

²⁰ *Erskine, Inst. B. 2, t. 9, n. 52.*

²¹ *Merlin, Rép. Linotte, et Quarte de Conjoint Pauvre.*

²² *Washburn, Real Prop.* 127; 1 Littleton, § 35; 8 Coke, 84.

²³ *Watson v. Watson*, 13 Conn. 83.

1722. *The requisites to create an estate by the curtesy are a marriage, seisin of the wife, birth of issue, and death of the wife.*

1723. *The marriage must be a lawful marriage, for a void marriage does not entitle the husband to the curtesy; as, if a married man were to marry a second wife during the existence of his first marriage, he would not be entitled to curtesy in such second wife's estate. But if the marriage be merely voidable, the husband will be entitled, because no marriage merely voidable can be annulled after the death of the parties.²⁴*

1724. According to the English law, *the seisin of the wife* must be a seisin in deed,²⁵ but this strict rule has been somewhat qualified by the circumstances of this country. Where a woman is the owner of wild, uncultivated land, not held adversely, she is considered as seised in fact, and the husband is entitled to his curtesy;²⁶ and where land is in lease for years, the perception of the esplees will be evidence of seisin,²⁷ so as to entitle the husband to the curtesy; and even without receipt of rent, the possession of the lessee being deemed the possession of the husband and wife.²⁸ And in this country it is said that as a general proposition seisin in law, such, for example, as that which the law throws upon the heir on the death of the ancestor, is sufficient,²⁹ at least except in those cases where an actual entry is necessary to complete a title at common law.³⁰

The wife's seisin must have been such as would entitle her to inherit. But in point of time it is not requisite that it should be before the birth of issue; it may be either before or after.³¹

But statutes have been enacted in several of the states which have wholly or partially changed the law in relation to the requisition of a seisin in deed.³²

1725. To entitle the husband to curtesy *the issue* must be born alive, in the lifetime of the mother, and be capable of inheriting the estate.

1726. The issue must be born alive. In Pennsylvania the husband's right as tenant by the curtesy attaches, although there be no issue of the marriage, in all cases where the issue, if any, would have inherited, because if dead born it is the same as if it had never existed,³³ it being a maxim of law that *mortuus exitus non est exitus*;³⁴ and with this agrees the Roman law.³⁵ Whether a child is born alive is to be ascertained from certain signs which are always attendant upon life. The fact of the child's crying is the most certain. There may be a certain motion in a new-born infant which may last even for hours, and yet

²⁴ Cruise, Dig. t. 5, c. 1, s. 6.

²⁵ Adams v. Logan, 6 T. B. Monr. Ky. 179; Bush v. Bradley, 4 Day, Conn. 298; 1 Pet. 507; Mercer v. Seldin, 1 How. 37; 17 Pet. 61.

²⁶ Davies v. Mason, 1 Pet. 506; Jackson v. Sellick, 8 Johns. N. Y. 262; Lowry v. Steel, 4 Ohio, 170; Barr v. Galloway, 1 McLean, C. C. 476; McCorry v. King, 3 Humphr. Tenn. 267; Pierce v. Warrett, 10 Ired. No. C. 446; Wells v. Thompson, 13 Ala. N. S. 793; Day v. Cochran, 24 Miss. 277.

²⁷ Barr v. Galloway, 1 McLean, C. C. 476.

²⁸ Lowry v. Steel, 4 Ohio, 170; Green v. Litter, 8 Cranch, 245; Tayloe v. Gould, 10 Barb. N. Y. 388; Powell v. Gossom, 18 B. Monr. Ky. 179; Carter v. Williams, 8 Ired. Eq. No. C. 177.

²⁹ 1 Washburn Real Prop. 135; Adair v. Lott, 3 Hill, N. Y. 182; Chew v. Commissioners, 5 Rawle, Penn. 160; Day v. Cochran, 24 Miss. 261; Stephens v. Hume, 25 Mo. 349; Kline v. Beebe, 6 Conn. 494; Merritt v. Hume, 5 Ohio St. 307.

³⁰ Wass v. Bucknam, 38 Me. 360; Stephens v. Hume, 25 Mo. 349; Neely v. Butler, 10 B. Monr. Ky. 48; Den v. Demarest, 1 N. J. 525.

³¹ Johnson v. Johnson, 5 Cow. N. Y. 74.

³² Bush v. Bradley, 4 Day, Conn. 298; Stoolfoos v. Jenkins, 8 Serg. & R. Penn. 175; Chew v. Southwark, 5 Rawle, Penn. 161; 8 Johns. N. Y. 262; 1 Pet. 506.

³³ Dunlop, Penn. Laws, 510, (act of April 8, 1833); Dubs v. Dubs, 31 Penn. St. 154. See Marsellis v. Thalheimer, 2 Paige, Ch. N. Y. 35.

³⁴ Coke, Litt. 29, b; and see 2 Paige, Ch. N. Y. 35.

³⁵ Dig. 50, 16, 129; Domat, liv. prél. t. 2, s. 1, n. 4 and 6; 1 Chitty, Pract. 35, note (z).

there may not be complete life. It seems that in order to commence life the child must actually have breathed.³⁶

1727. The issue must be born during the life of the mother; for if the mother dies in labor, and the Cæsarean operation is performed after her death, the husband is not tenant by the curtesy; because at the instant of the mother's death he clearly was not entitled, for then he had no issue born, and the land descended to the child in the mother's womb, it being a rule that a child *in ventre sa mere* can inherit if he be afterward born alive, though if he be born dead, he cannot transmit any right to others; and the estate being so vested, it shall not afterward be taken from the child.³⁷ But the time when the issue is born is immaterial, provided it be during the coverture.³⁸

1728. The issue must not only be born during the life of the mother, but it must be capable of inheriting the mother's estate in order to entitle the husband to the curtesy. If, therefore, a woman be a tenant in tail male, and has only a daughter born, the husband is not tenant by the curtesy, because the child could not inherit the estate in tail male.³⁹

1729. By the birth of the child the husband becomes tenant by the curtesy initiate, but his estate is not consummate until the death of the wife.

1730. The estate of the husband, which is initiate upon the birth of a child, as already stated, does not become complete or consummate until the death of the wife. During this period, the freehold is in him, and cannot be prevented from vesting by any disclaimer short of an actual release.⁴⁰ During this period the seisin of husband and wife is said to be joint.⁴¹ And the right and estate of the husband is liable to be taken for his debts.⁴²

1731. Curtesy was formerly confined to such lands as were given in frank marriage,⁴³ but was soon after extended to *all the inheritances of the wife*. Curtesy may be had of an estate of inheritance in fee, or in an estate held in trust for the wife,⁴⁴ but the husband is not entitled to curtesy to lands devised to a trustee for the separate use of the wife in fee simple.⁴⁵

But when the wife's estate is in reversion or remainder, the husband is not, in general, entitled to the curtesy, unless the particular estate is ended during the coverture.⁴⁶

³⁶ Briand, *Méd. Lég. prém. partie*, c. 6, art. 1. To constitute a birth, so as to make the killing of the child murder, the whole body must be detached from that of the mother. 5 Carr. & P. 329; 6 Carr. & P. 347. But if it be killed after it has come wholly forth from the body of the mother, but is still connected with the umbilical cord, such killing will be murder. 9 Carr. & P. 25.

³⁷ Coke, *Litt.* 29; 2 Sharswood, *Blackst. Comm.* 128; *Marsellis v. Thalheimer*, 2 Paige, Ch. N. Y. 42.

³⁸ *Jackson v. Johnson*, 5 Cow. N. Y. 74; *Guion v. Anderson*, 8 Humphr. Tenn. 307; *Heath v. White*, 5 Conn. 236. But see *Hatham v. Lyon*, 2 Mich. 93.

³⁹ *Heath v. White*, 5 Conn. 228, 236; *Day v. Cochran*, 24 Miss. 261; *Barker v. Barker*, 2 Sim. Ch. 249; *Sumner v. Partridge*, 2 Atk. Ch. 47.

⁴⁰ *Watson v. Watson*, 13 Conn. 83; *Witham v. Perkins*, 2 Me. 400.

⁴¹ *Melvin v. Proprs.* 16 Pick. Mass. 161; *Guion v. Anderson*, 8 Humpr. Tenn. 298; *Junction R. R. v. Harris*, 9 Ind. 184; *Wass v. Bucknam*, 38 Me. 356. As to the effect of a disseisin, see *Foster v. Marshall*, 22 N. H. 491; *Bruce v. Wood*, 1 Metc. Mass. 542; *Mellus v. Snowman*, 21 Me. 205; *Miller v. Shackelford*, 4 Dan. Ky. 264; 1 Washburn, *Real Prop.* 425.

⁴² *Canby v. Porter*, 12 Ohio, 79; *Mattocks v. Stearns*, 9 Vt. 326; *Day v. Cochran*, 24 Miss. 261; *Lancaster Bank v. Stauffer*, 10 Penn. St. 398; *Litchfield v. Cudworth*, 15 Pick. Mass. 23.

⁴³ As to what is frank marriage, see 2 Sharswood, *Blackst. Comm.* 115.

⁴⁴ *Watts v. Ball*, 1 P. Will. Ch. 108; *Shoemaker v. Walker*, 2 Serg. & R. Penn. 556; *Dubs v. Dubs*, 31 Penn. St. 149; *Payne v. Payne*, 11 B. Monr. Ky. 138.

⁴⁵ *Cockran v. O'Hern*, 4 Watts & S. Penn. 95; *Rigler v. Cloud*, 14 Penn. St. 361; *Clark v. Clark*, 24 Barb. N. Y. 582. But see *Hearle v. Greenbank*, 3 Atk. Ch. 696; *Morgan v. Morgan*, 5 Madd. Ch. 408; 4 Kent, *Comm.* 33, note; 11 Am. Jur. 55.

⁴⁶ *Perk*, §§ 457, 464; *Coke*, *Litt.* 29, a; *Stoddard v. Gibbs*, 1 Sumn. C. C. 263.

Regularly, a man may be tenant by the curtesy of lands, tenements, and hereditaments of freehold, and also of some incorporeal hereditaments, as a rent.

In equity, the husband may be tenant by the curtesy of money agreed or directed to be laid out in land, though not actually laid out.⁴⁷

1732. *The husband's right to curtesy will be lost when the wife's estate which she had during coverture is defeated by a paramount title.*

By a divorce *a vinculo*,⁴⁸ but not by a divorce *a mensa et thoro*.⁴⁹

By a conveyance in fee.⁵⁰

Unlike the case of the wife, who loses her dower by adultery, the husband does not lose his curtesy on that account.⁵¹

1733. By statutory provisions the common law doctrines relative to this estate have been considerably modified in several of the states. In California, no curtesy is allowed, but the survivor, husband or wife, takes one-half of all real estate acquired during coverture in severalty. In Georgia, the husband takes an absolute estate in all the wife's real property. In Indiana, curtesy is abolished. In Iowa, the husband has a life estate in one-third of the wife's real property. In Kansas, the husband takes one-half of the wife's property if she dies intestate, and the whole of it if she leaves no issue. In Louisiana, there is no curtesy. It is given by statute in Delaware, Kentucky, Maine, Massachusetts, Michigan, Minnesota, New York, Ohio, Oregon, Rhode Island, Vermont, and Wisconsin. And in Alabama, Connecticut, Illinois, Maryland, Mississippi, Missouri, New Jersey, New Hampshire, North Carolina, Pennsylvania, Tennessee, and Virginia, it is recognized as an existing estate.⁵²

In South Carolina, the tenancy by curtesy, *eo nomine*, has ceased by the provisions of an act passed in 1791, relative to the distribution of intestates' estates, which gives to the husband surviving his wife the same share of her real estate as she would have taken out of his if left a widow, and that is one-third or one-half in fee, according to circumstances.

1734. The second kind of estate for life which arises by operation of law is the estate in dower.⁵³

1735. *Dower at common law is the right of a woman in a third part of all the lands and tenements, in fee simple, fee tail general, or as heir in special tail, of which her deceased husband was seised, either in deed or in law, at any time during the coverture, and of which any issue she might have had might by possibility have been heir, to hold to herself during her natural life.*⁵⁴

1736. Besides this kind of dower, which is the only one prevalent in the United States, there are other species in England, namely:

Dower ad ostium ecclesie, which takes place when a man comes to the church door to be married, and after troth plighted he endows his wife of a certain portion of his lands.

⁴⁷ *Sweetapple v. Bindon*, 2 Vern. Ch. 536; *Dodson v. Hay*, 4 Brown, Ch. 404; *Cunningham v. Moody*, 1 Ves. Ch. 174. See *Greene v. Green*, 1 Ohio, 244; 13 Pick. Mass. 154.

⁴⁸ *Wheeler v. Hotchkiss*, 10 Conn. 225; *Mattocks v. Stearns*, 9 Vt. 326.

⁴⁹ *Smoot v. Levat*, 2 Ala. 590.

⁵⁰ At least in some of the states. *French v. Rollins*, 21 Me. 372; 5 Dane, Abr. 11-13; 4 Kent, Comm. 84; *Grant v. Chase*, 17 Mass. 446.

⁵¹ *Sidney v. Sidney*, 1 P. Will. Ch. 269. But this common-law rule has been changed by statute in some of the states. See 1 Hilliard, Real Prop., 3d ed. 82, note b.

⁵² *Wood*, Cal. Dig. 488, § 10; *Cobb*, Dig. Ga. Laws, 304; Ind. Stat. 1850, Ch. 147, § 10; and see 1 Rev. Stat. 1860, p. 420; *Kans. Comp. Stat.* 1862, ch. 141, §§ 4, 5; *McCorry v. King*, 3 Humphr. Tenn. 267; *Reaume v. Chambers*, 22 Mo. 36; 1 Greenleaf, Cruise, Dig. 140, n; *Washburn*, Real Prop. 129.

⁵³ See generally as to dower, *Bacon*, Abr.; *Dane*, Abr.; *Comyn*, Dig.; *Perk.* 300, *et seq.*; 1 *Swift*, Dig. 85; 1 Vern. Ch. *Raithby*, 218, n, 358, n; *Archbold*, Civ. Pl. 469; *Viner*, Abr.; *Scribner*, Dower.

⁵⁴ *Litt. s.* 36; 7 Me. 383.

Dower *ex assensu patris*; this is only a species of dower *ad ostium ecclesiæ*, by which the son, with the consent of the father, endowed his wife, at the church door, of a certain portion of his father's land.

There was another kind, *de la plus belle*, to which the abolition of military tenure has put an end.

In addition to these, there was a kind of dower by particular customs.

1737. As by the common law the husband is entitled to all the wife's chattels in possession, and has a right to reduce in possession those which are in action, and is entitled besides to a curtesy in his wife's land when he survives her, it is but just that the wife should have dower in his lands for her support after his death.

1738. To create a title to dower three things are indispensably requisite: marriage, seisin of the husband, and death of the husband.

1739. The right which a woman has to have dower in her husband's estate being one of the civil effects of marriage, it follows that, to entitle her to have dower out of her husband's estate, the marriage must not only have been lawfully contracted, but it must have been such as to have civil effects.⁵⁵

When the marriage has been contracted in good faith, and it was merely voidable during the lives of the parties, it is such a marriage as will entitle the wife to dower, because it cannot be avoided by others after the death of one of the parties.⁵⁶ A wife *de facto*, whose marriage is voidable by decree, as well as a wife *de jure*, is entitled to it; and the wife shall be endowed though the marriage be within the age of consent, and the husband dies within that age.⁵⁷

1740. The husband must have been seised some time during the coverture of the estate of which the wife is dowable; and the estate of which he was so seised must have been such that any issue which the wife might have had might by possibility have been heir. A seisin in law of the husband will be as effectual as a seisin in deed to render the wife dowable, because the wife cannot control the husband to bring his title to an actual seisin.⁵⁸

But to entitle the wife to dower, the seisin must vest the land in the husband beneficially for his own use,⁵⁹ though the length of time during which the husband was seised is immaterial.⁶⁰ The seisin of the husband for a transitory instant only, when the same act which gives him the estate also conveys it out of him again, will not entitle the wife to dower.⁶¹

1741. By the death of the husband is meant natural death. Civil death, which

⁵⁵ Smart *v.* Whaley, 17 Miss. 308; Higgins *v.* Breen, 9 Mo. 497; Donnelly *v.* Donnelly, 8 B. Monr. Ky. 113.

⁵⁶ Cruise, Dig. t. 5, c. 1, s. 6.

⁵⁷ Coke, Litt. 33, a; Doct. & S. 22.

⁵⁸ Perk. 371, 372; Coke, Litt. 31, a; Eldredge *v.* Forrestal, 7 Mass. 253; Atwood *v.* Atwood, 22 Pick. Mass. 283; Mann *v.* Edgar, 39 Me. 25; Dunham *v.* Osborne, 1 Paige, Ch. N. Y. 635. This seisin must be a right to immediate corporeal seisin. Thomas *v.* Thomas, 10 Ired. No. C. 193. And without any adverse seisin in a third party. Small *v.* Proctor, 15 Mass. 495; Richardson *v.* Skolfield, 45 Me. 386. And see Baker *v.* Chase, 6 Hill N. Y. 482; Jenny *v.* Jenny, 24 Vt. 324; Cranson *v.* Cranson, 4 Mich. 220; Brewer *v.* Connell, 11 Humphr. Tenn. 500, as to the effect of a voluntary conveyance by the husband prior to marriage to avoid a claim to dower.

⁵⁹ Stanwood *v.* Stanwood, 14 Me. 372; Randolph *v.* Doss, 4 Miss. 205; Griggs *v.* Smith, 7 Halst. N. J. 22; Stow *v.* Tift, 15 Johns. N. Y. 458; Maybury *v.* Brien, 15 Pet. 21; Crafts *v.* Crafts, 2 McCord, So. C. 54; Holbrook *v.* Finney, 4 Mass. 566; Coates *v.* Cheever, 1 Cow. N. Y. 460.

⁶⁰ McCauley *v.* Grimes, 2 Gill & J. Md. 318; Gage *v.* Ward, 25 Me. 101; Douglass *v.* Dickson, 11 Rich. So. C. 417; McClure *v.* Harris, 12 B. Monr. Ky. 261.

⁶¹ Coke, Litt. 31; Nash *v.* Preston, Croke, Car. 190; Sneddy *v.* Sneddy, 1 Atk. Ch. 442; 2 Sharswood, Blackst. Comm. 132; Bullard *v.* Bowers, 10 N. H. 500; Stanwood *v.* Dunning, 14 Me. 290; Emerson *v.* Harris, 6 Metc. Mass. 475; Reed *v.* Morrison, 12 Serg. & R. Penn. 18; Gilliam *v.* Moore, 4 Leigh, Va. 30; Maybury *v.* Brien, 15 Pet. 39; Griggs *v.* Smith, 7 Halst. N. J. 22; Pendleton *v.* Pomeroy, 4 All. Mass. 510.

took place in England when a man became a monk, was not sufficient.⁶² There is nothing known as civil death in this country which will give the enjoyment of estate in dower.

1742. All women who are citizens of the United States, and have attained the age of nine years before the death of their respective husbands, are by the common law entitled to dower, of whatever age the husbands may be.⁶³

At common law an alien could not be endowed, because no alien could hold lands;⁶⁴ but in several of the states of the Union this disability has been removed by statute, at least to a certain extent, and in such cases doubtless the widow would be entitled to dower.⁶⁵ In New York it has been held that where the wife of a citizen was an alien, and while she remained such he sold and conveyed his estate, she was not entitled to dower, although she afterward became naturalized before the death of her husband.⁶⁶ By act of congress, however, it is now provided that any woman who might be lawfully naturalized under then existing laws, who is or shall be married to a citizen of the United States, shall be deemed and taken to be a citizen.⁶⁷ It may be doubted, perhaps, whether this act extends to a case where both husband and wife are aliens at the time of marriage. It seems to be well established that naturalization would operate to give dower in estates previously conveyed, although without release.⁶⁸

1743. When the husband owns the land in fee and has been seised during the marriage, the wife is entitled, as a matter of course, this being the simplest kind of estate of inheritance. In this case the freehold and the inheritance are consolidated, and are in the husband *simul et semel* during the marriage, and thus render the wife dowable.

A woman is dowable of all estates of which her husband was seised in tail general or special of which her issue could inherit. She is also entitled to dower to all estates held in coparcenary or in common of which the husband was seised.⁶⁹ But when the husband holds in joint tenancy, the wife is not dowable, because the survivor is entitled to the whole; nor is she entitled where the husband conveys his interest in such joint tenancy to another.⁷⁰

A widow is not dowable of an estate of which the husband is seised of a base and determinable fee which is determined prior to his death,⁷¹ nor where the estate was upon condition and entry has been made for breach,⁷² nor where the seisin is divested by causes relating back of the seisin,⁷³ and which destroy the seisin. The better opinion seems to be that where the husband's estate is determined by the happening of a contingency by way of executory devise or shifting use, the widow is entitled to dower.⁷⁴

A widow is not dowable of an estate in remainder of reversion expectant as

⁶² 2 Crabb, Real Prop. 131.

⁶³ Coke, Litt. 33, a.

⁶⁴ Sutliff v. Forgey, 1 Cow. N. Y. 89. See 5 *id.* 713; Sistare v. Sistare, 2 Root, Conn. 468.

⁶⁵ 4 Kent, Comm. 36, 37, 4th ed.

⁶⁶ Priest v. Cummings, 16 Wend. N. Y. 617.

⁶⁷ Act of Feb. 10, 1855, § 2.

⁶⁸ Priest v. Cummings, 16 Wend. N. Y. 617; 20 *id.* 338; Keenan v. Keenan, 7 Rich. So. C. 345; White v. White, 2 Metc. Ky. 185. And see Ainslie v. Martin, 9 Mass. 454; Culverhouse v. Beach, 1 Johns. Cas. N. Y. 399.

⁶⁹ Potter v. Wheeler, 13 Mass. 504.

⁷⁰ Maybury v. Brien, 15 Pet. 21.

⁷¹ 1 Washburn, Real Prop. 208.

⁷² Beardslee v. Beardslee, 5 Barb. N. Y. 324; Northcutt v. Whipp, 12 B. Monr. Ky. 72.

⁷³ Greene v. Greene, 1 Ohio, 249; Weir v. Tate, 4 Ired. Eq. No. C. 264; Mitchell v. Mitchell, 8 Penn. St. 126.

⁷⁴ Buckworth v. Thinkell, 3 Bos. & P. 652; Moody v. King, 2 Bingh. 447; Milledge v. Lamar, 4 Des. Eq. So. C. 617; Evans v. Evans, 9 Penn. St. 190; Northcutt v. Whipp, 12 B. Monr. Ky. 90; 1 Washburn, Real Prop. 216. But see 4 Kent, Comm. 50.

an estate of freehold, because the husband has no seisin.⁷⁵ And this will be the case even where the freehold outstanding in a third party only intervenes between a freehold in the husband and the estate in remainder; as, where an estate is limited to A for life, remainder to B for life, remainder over to A in fee, A's wife is not entitled to dower.⁷⁶ But she is entitled to dower of a reversion expectant on a term for years, because in this case he is seised of the freehold.⁷⁷

1744. The widow is entitled to dower in lands mortgaged by her husband. Where the mortgage is a subsisting incumbrance at the time of marriage, the right attaches subject to the mortgage, and is liable to be defeated by foreclosure under the mortgage.⁷⁸

If the widow is obliged to redeem the premises by payment of the mortgage debt to prevent a loss of dower by such foreclosure, she is entitled to re-payment of an equitable portion by the owners of the reversion,⁷⁹ or to an assignment of the mortgage if they decline.

A mortgagee subsequent to the marriage takes subject to the dower claim in the same manner as a grantee, unless the wife releases her dower. In this last case, as in case of her claim in lands mortgaged before coverture, her claim is an equitable one, and is sufficient to entitle her to bring a bill in equity to redeem.⁸⁰

As against all the world, except the mortgagee and his assigns, the widow is entitled to have dower set out in the mortgaged premises.⁸¹ This was held to be the case by common law in most of the states, and the law is now established to the same effect by statute in most if not all the states.⁸²

When a beneficiary trust is held for the husband, in several of the states of the Union the wife is entitled to dower in such trust estate,⁸³ while in others and in England she is not so entitled.⁸⁴

1745. The widow is entitled to dower in all hereditaments, whether corporeal or incorporeal; she may be therefore endowed of a rent, provided the husband was seised of an estate of inheritance in the same.

The right to dower extends to all mines of coal or lead wrought during the coverture, whether by the husband or by lessees for years paying pecuniary

⁷⁵ *Blood v. Blood*, 23 Pick. Mass. 80; *Shoemaker v. Walker*, 2 Serg. & R. Penn. 554; *Fisk v. Eastman*, 5 N. H. 240; *Otis v. Parshley*, 10 *id.* 403; *Durando v. Durando*, 23 N. Y. 331; *Northcutt v. Whipp*, 12 B. Monr. Ky. 65; *Apple v. Apple*, 1 Head, Tenn. 348; *Weir v. Tate*, 4 Ired. Eq. No. C. 264; *Cocke v. Phillips*, 12 Leigh, Va. 248; *Gardner v. Greene*, 5 R. I. 104; *Watkins v. Thornton*, 11 Ohio St. 367; *Robinson v. Codman*, 1 Sumn. C. C. 121.

⁷⁶ *Perkins*, §§ 333-338; *Bates v. Bates*, 1 Ld. Raym. 326.

⁷⁷ *Perkins*, § 336; *Weir v. Humphries*, 4 Ired. Eq. No. C. 273.

⁷⁸ *Stow v. Tift*, 15 Johns. N. Y. 458; *Frost v. Peacock*, 4 Edw. Ch. N. Y. 678; *Reed v. Morrison*, 12 Serg. & R. Penn. 18; *Holbrook v. Finney*, 4 Mass. 566; *Nottingham v. Calvert*, 1 Ind. 527; *Smith v. Stanley*, 37 Me. 11.

⁷⁹ *Caton v. Simonds*, 14 Pick. Mass. 98; *McCabe v. Bellows*, 7 Gray, Mass. 148; *Bell v. Mayor*, 10 Paige, Ch. N. Y. 49; *Wilkins v. French*, 20 Me. 111; *McMahan v. Kimball*, 3 Blackf. Ind. 1, 12.

⁸⁰ *Gibson v. Crehore*, 3 Pick. Mass. 475; 5 *id.* 146; *Eaten v. Simonds*, 14 *id.* 98; *Furman v. Clark*, 3 Stockt. Ch. N. J. 135; *Manty v. Buchanan*, 1 Md. Ch. Dec. 202; *Smith v. Eustis*, 7 Me. 41.

⁸¹ *Savage v. Dooley*, 28 Conn. 411; *Young v. Tarbell*, 37 Me. 509; *Hastings v. Stevens*, 19 N. H. 564; *Brigham v. Winchester*, 1 Metc. Mass. 390; *Taylor v. Fowler*, 18 Ohio, 567; *Collins v. Torrey*, 17 Johns. N. Y. 278; *Whitehead v. Middleton*, 12 Miss. 692; *Montgomery v. Bruere*, 2 South. N. J. 865. *Contra*, *Hopkins v. Frey*, 2 Gill, Md. 359; 2 Brev. So. C. 211.

⁸² See 1 Scribner, Dower, 244, *et seq.*

⁸³ 4 Kent, Comm. 46.

⁸⁴ *Hamlin v. Hamlin*, 19 Me. 141.

rents or rents in kind; but dower cannot be claimed of mines or strata unopened.⁸⁵

1746. As a consequence of the principle that what avoids the seisin of the husband avoids his widow's right to dower, it happens that the assignment of dower to the ancestor's widow will prevent the assignment of dower in the whole of the ancestor's estate to the descendant's widow. This maxim is commonly expressed in Latin, *Dos de dote peti non debet*.

The widow of the heir is entitled to dower out of the whole estate if the dower of the ancestor's widow has not been assigned at the death of the heir.⁸⁶ But the widow of the ancestor may have her dower set out, and the dower of the heir's widow will then be defeated as to one-third of the estate, the assignment operating by relation to the death of the ancestor, and divesting the seisin of the heir. Or, if the widow of the ancestor shall have her dower assigned during the life of the heir, he is a mere reversioner as to the portion so assigned, and his widow (the ancestor's widow still living) is not entitled to dower in the portion so set out, even after the death of the ancestor's widow, as her husband had no seisin thereof.⁸⁷ In case of a purchaser the rule must be different, for while the widow of the vendor will be entitled to dower, as against the widow of the purchaser, yet this interruption to the latter's estate will only be during the lifetime of the vendor's widow, since the purchaser became seised of the whole estate by the purchase, subject to the incumbrance.⁸⁸ But a release by the elder widow may operate as an extinguishment of her right, and entitle the widow of the heir or devisee to dower in the whole estate,⁸⁹ though to have this effect the release must be made before assignment made.⁹⁰

1747. Where the land has been aliened, both by the English and American law the widow is entitled to dower according to its condition at the time of assignment, where its value has been diminished.⁹¹ Where it has been increased by the English law she is entitled according to the actual value at the time of the husband's death.⁹²

By the American law the widow may share in any increased value, arising from natural or extraneous causes, independent of the improvements made by the alienee,⁹³ as much as she must suffer by any decrease in value.⁹⁴ But in case the heir has made improvements before assignment of dower, the dowager is entitled to dower of the whole estate at the time of the assignment, for it was the heir's folly to make such improvements before dower was assigned.⁹⁵

⁸⁵ *Stoughton v. Leigh*, 1 Taunt. 402; *Billings v. Taylor*, 10 Pick. Mass. 460; *Crouch v. Puryear*, 1 Rand. Va. 258.

⁸⁶ *Hitchens v. Hitchens*, 2 Vern. Ch. 405; *Geer v. Hamblin*, 1 Me. 54; *Robinson v. Miller*, 2 B. Monr. Ky. 288; *Elwood v. Klock*, 13 Barb. N. Y. 50.

⁸⁷ *Geer v. Hamblin*, 1 Me. 54; *Cook v. Hammond*, 4 Mas. C. C. 485; *Dunham v. Osborn*, 1 Paige, Ch. N. Y. 634; *Safford v. Safford*, 7 id. 259; *Leavitt v. Lamprey*, 13 Pick. Mass. 382; *Apple v. Apple*, 1 Head. Tenn. 343; 1 Washburn, Real Prop. 210.

⁸⁸ *Bustard's Case*, 4 Coke, 122; *Manning v. Lahore*, 33 Me. 343; *Dunham v. Osborn*, Paige, Ch. N. Y. 634; *Durando v. Durando*, 23 N. Y. 331.

⁸⁹ *Elwood v. Klock*, 13 Barb. N. Y. 50; *Atwood v. Atwood*, 22 Pick. Mass. 283.

⁹⁰ *Leavitt v. Lamprey*, 13 Pick. Mass. 382.

⁹¹ *Doe v. Gwinnell*, 1 Q. B. 682; *Campbell v. Murphy*, 2 Jones, Eq. No. C. 362; *McClanahan v. Porter*, 10 Mo. 746; *Powell v. Monson*, 3 Mas. C. C. 368.

⁹² *Doe v. Gunning*, 1 Q. B. 682.

⁹³ *Leggett v. Steele*, 4 Wash. C. C. 305; *Wilson v. Oatman*, 2 Blackf. Ind. 223; *Bowie v. Berry*, 3 Md. Ch. Dec. 459; *Humphrey v. Phinney*, 2 Johns. N. Y. 484; *Hobbs v. Harvey*, 16 Me. 80; *Catlin v. Ware*, 9 Mass. 218; *Thompson v. Monroe*, 5 Serg. & R. Penn. 289; *Tod v. Baylor*, 4 Leigh, Va. 498; *Wilson v. Oatman*, 2 Blackf. Ind. 228; *Brown v. Duncan*, 4 McCord, So. C. 346; *Lanowe v. Beam*, 10 Ohio, 498.

⁹⁴ *Smith v. Addleman*, 5 Blackf. Ind. 406; *Johnston v. Vandyke*, 6 McLean, C. C. 422; *Braxton v. Coleman*, 5 Call, Va. 433; *Bowie v. Berry*, 1 Md. Ch. Dec. 452.

⁹⁵ *Catlin v. Ware*, 9 Mass. 218; *Powell v. Monson*, 3 Mas. C. C. 368.

1748. In equity, when lands are agreed to be turned into money, or money into land, they are considered as of that kind of property into which they were agreed to be converted; and the right to such property is regulated as to the widow's right as if the conversion had happened.⁶⁶

1749. By *assignment of dower* is meant the determination of the particular part of the husband's estate which the widow is to enjoy in possession. Her right is fixed by his death, and upon this determination a freehold vests in her by act of law. It will be convenient to consider when the assignment should be made, by whom it should be made, how it should be made, and its effects.

1750. The right of the wife becomes consummate by the death of the husband, and at common law she is immediately entitled to it, or within the period of forty days after, during which time the wife has a right, by Magna Charta, c. 7, to remain in her husband's late dwelling-house, of which she is dowable, and to be supported *de bonis viri*.⁶⁷ This right of residence is called her *quarantine*.⁶⁸

1751. *The assignment ought to be made by the heir*, or the person entitled to the freehold, for such assignment cannot be made by a person who has not a freehold in the estate, or against whom a writ of dower does not lie. But it is not requisite that the assignor should have a lawful estate of freehold; therefore a disseisor, abator, or intruder may assign, and the assignment cannot be avoided unless such person is in covin with the widow.⁶⁹

It may be made by an infant heir, subject to a writ of admeasurement of

⁶⁶ *Green v. Green*, 1 Ohio, 538.

⁶⁷ Various laws regulating the widow's right to quarantine have been passed in the several states. In some she may occupy the mansion one year; in others till dower is assigned; and in some she is not only entitled to the mansion, but the plantation.

⁶⁸ Coke, Litt. 32, 34. The length of quarantine varies considerably in different states. The provisions of most of the states have been collected by Professor Washburn in his valuable work on Real Property, and are given by him as follows: In *Alabama*, the widow has the use of the dwelling-house in which the husband usually resided, rent free, till her dower is assigned; Ala. Code, 1852, § 1359; even against the alienee of her husband. *Shelton v. Carroll*, 16 Ala. N. S. 143; *Pharis v. Leachman*, 20 *id.* 662. In *Arkansas*, she has the mansion-house two months, and until dower is assigned. Ark. Dig. Stat. 1858, Ch. 60, § 17. In *Florida*, *Illinois*, *Kentucky*, *Mississippi*, *Missouri*, and *New Jersey*, she holds till dower is assigned. Thompson, Dig. Fla. Laws, 1847, Div. 2, Tit. 1, Ch. 2, § 2; Ill. Rev. Stat. 1856, Ch. 34, § 27; Ky. Rev. Stat. 1860, Ch. 47, art. 4, § 9; *Chaplin v. Simmons*, 7 T. B. Monr. Ky. 337; Miss. Rev. Code, 1857, Ch. 50, art. 174; Mo. Rev. Stat. 1845, Ch. 54, § 15; N. J. Rev. Stat. 1847, Ch. 4, § 2. The rule is the same in *Rhode Island*, if the widow brings her writ of dower within twelve months of the grant of administration. R. I. Rev. Stat. 1857, Ch. 202, § 6. In *Texas*, the law is the same as in *Alabama*. Hartley, Dig. Tex. Laws, 1850, p. 287. In *Virginia*, she has, in addition, the profits of one-third of the real estate. Va. Code, 1849.

In *Connecticut*, the widow, immediately upon the death of the husband, becomes tenant in common with the husband's heirs of her dower. The family of the deceased is allowed to remain on the homestead until the dwelling-house and land are sold or disposed of according to law. Conn. Stat. 1855, Ch. 56; *Stedman v. Fortune*, 5 Conn. 462. In *Indiana*, the widow may occupy the mansion-house, and messuage not exceeding forty acres, free of rent, for one year. Ind. Stat. 1852, Ch. 27, § 28. In *Maine*, the period is ninety days. Me. Rev. Stat. 1857, Ch. 103, § 15. In *Massachusetts*, she may occupy the premises with the children or heirs of the deceased, or receive one-third of the rent till the dower is set out. Mass. Gen. Stat. Ch. 90, §§ 7, 8. In *Michigan* and *Minnesota*, she may remain one year in the house. Mich. Rev. Stat. 1846, Ch. 66, § 23; Minn. Comp. Stat. 1859, Ch. 36, § 23. In *New York*, the period is forty days. 3 N. Y. Rev. Stat. 5th. ed. 1859, p. 83, § 17. In *New Hampshire*, the widow is entitled to occupy the house of her husband forty days without rent, and have reasonable sustenance out of the estate; and she is entitled to one-third part of the rents and profits out of the estate of which her husband died seised until dower is assigned. N. H. Laws, 1862, Ch. 2599. In *Vermont*, she may occupy with the heirs till dower is set out. Vt. Rev. Stat. 1863, Ch. 55, § 10. In *Wisconsin*, she may occupy the house for one year. Wisc. Rev. Stat. 1858, Ch. 89, § 23.

⁶⁹ Plowd. 54; Perk. ss. 394, *et seq.*

dower,¹⁰⁰ or by the guardian of the infant heir,¹⁰¹ and by one of two joint tenants.¹⁰² It may be made by the alienee of the husband.¹⁰³

1752. The assignment of dower at common law is of one-third part of the lands and tenements of which the widow is dowable, to be set out by metes and bounds, where the same is practicable, to be held by her for life. This is the assignment of dower to which the widow is entitled of common right, and is the form the assignment must take when made by legal process,¹⁰⁴ or by the heir or alienee without the assent of the dowress. Where the parties agree upon a different assignment, it may be effectual,¹⁰⁵ but to bar the dowress of her claim the agreement must be by indenture, by which she will be estopped.¹⁰⁶

1753. *Assignment by the parties* may be made by deed, by writing not under seal, or by parol,¹⁰⁷ because the widow does not hold by virtue of assignment, but by law, nothing being required but to ascertain her share, and when this is done and she has entered, the freehold vests in her.

1754. To an assignment of dower of common right several things are requisite.

It must be either of some part of the land of which she is dowable, or of a rent or other profit issuing out of the same. An assignment of other land of which she is not dowable, or of a rent issuing out of the same, is no bar to an action for dower unless the assignment be made by the consent of the widow, in which case she will be bound by her agreement.¹⁰⁸

It must be an absolute assignment, for a conditional assignment will not bar her of her dower.¹⁰⁹ It has been held that if lands be assigned to the widow as her dower with the exception of trees growing upon it, the exception is void.¹¹⁰

Dower must be assigned of an absolute estate for life; an assignment to the widow of an estate for years, therefore, would not bar her claim for dower.

1755. *Dower may be assigned by the sheriff.* The widow has a right to have the assignment made by metes and bounds where it can be done, and sometimes it is the interest of third persons that it should be so made, and that each tract of land should be subject to its dower; as, for example, where the husband died seised of two farms and he had been seised of another which he had sold during the coverture, it is the right of the widow to have her dower in each tract, and it is the interest of the heir and the alienee that each should be subject to it, and that the widow should not take one of the farms as her dower for the whole three.¹¹¹

1756. Where a house is subject to dower, the widow's right may be assigned by giving her certain rooms in it.¹¹² In a case where the sheriff assigned to the widow one-third of each room in the house, marking the bounds with chalk, he was considered as having discharged his duty vexatiously and maliciously; the assignment was therefore set aside, and the sheriff was imprisoned for his contempt.¹¹³

¹⁰⁰ Jones v. Brewer, 1 Pick. Mass. 314; McCormick v. Taylor, 2 Ind. 336.

¹⁰¹ Stoughton v. Leigh, 1 Taunt. 402; Boyer v. Newbanks, 2 Ind. 388; Jones v. Brewer, 1 Pick. Mass. 314; Curtis v. Hobart, 41 Me. 230.

¹⁰² 2 Crabb, Real Prop. 142; Coke, Litt. 35, a.

¹⁰³ Stewart v. Stewart, 3 J. J. Marsh. Ky. 48; Harshaw v. Davis, 1 Strobb. So. C. 74.

¹⁰⁴ Booth v. Lambert, Style, 276; Pierce v. Williams, 2 Penn. 709.

¹⁰⁵ Coke, Litt. 34, b; Conant v. Little, 1 Pick. Mass. 189.

¹⁰⁶ Tudor, Lead. Cas. 52; 1 Washburn, Real Prop. 224; Jones v. Brewer, 1 Pick. Mass. 314.

¹⁰⁷ Conant v. Little, 1 Pick. Mass. 189; Blood v. Blood, 23 id. 80; Moore v. Waller, 2 Rand. Va. 421; Johnson v. Neil, 4 Ala. n. s. 166; Baker v. Baker, 4 Me. 67; Boyer v. Newbanks, 2 Ind. 388; Pinkham v. Gear, 3 N. H. 163; Meserve v. Meserve, 19 id. 240.

¹⁰⁸ Turney v. Sturges, Dy. 91, pl. 12.

¹⁰⁹ 1 Rolle, Abr. 682.

¹¹⁰ Coulter v. Holland, 2 Harr. Del. 330; Anon. F. Moore, 19.

¹¹¹ White v. Story, 2 Hill, N. Y. 543.

¹¹² Howard v. Cavendish, Croke, Jac. 621; Palm. 264.

1757. From the nature of the property in certain cases dower cannot be assigned of any particular part by metes and bounds; for example, where the husband holds in common with another, the dower must be assigned to hold in common also.¹¹⁴ Again, where the husband died seised of mines or minerals lying in the lands of another person, an assignment by metes and bounds cannot be made; and if there are several, the sheriff should assign such number of them as will be equal to one-third of the whole.¹¹⁵

1758. When an assignment is made by the heir of full age, it will be binding on him, though it may exceed one-third of the value of the estate; but if made by the heir while under age, he is entitled to a writ of admeasurement of dower.¹¹⁶

By the assignment the freehold for life in a third part of the estate is vested in the widow. As soon as dower is assigned she holds by virtue of law, and is in as of the estate of her husband; so that after assignment she is considered as holding by relation immediately from the death of her husband, and therefore the heir is not considered as having ever been seised of that part of his ancestor's estate of which the widow is endowed.¹¹⁷

1759. Before assignment a woman has no estate in the land of her deceased husband,¹¹⁸ and she cannot therefore mortgage it.¹¹⁹ After assignment and entry the freehold in the part assigned is vested in her, it being considered as a continuance of the husband's seisin.¹²⁰

1760. In the assignment of dower there is an implied warranty of title, and if the tenant in dower be impleaded, she may vouch the heir, and if evicted by paramount title from the lands assigned, she shall be endowed anew, unless in the cases where she has been endowed against common right with her own consent.¹²¹

1761. A tenant in dower is for many purposes in the same situation as a tenant for life, and is subject to the same liabilities. Standing in the place of her husband in respect to the land assigned her in dower, she is subject to one-third of the duties and services to which his estate was liable.¹²²

Such a tenant cannot commit waste, and is answerable to the heir if she commit or permit any such waste to the estate.¹²³

1762. A right of *dower may be prevented* from attaching, and then it is totally defeated; or it may be *barred* by a variety of causes after it has attached. These will be separately examined.

1763. When a third party recovers the land from the husband by a just prior title, it is clear the wife can have no dower in it, because the wife can be entitled to dower only in the land of which her husband was of right seised of an estate of inheritance.¹²⁴

The widow's right to dower will be defeated upon the restoration of the seisin under the prior title in the case of a defeasible estate, as in case of a re-entry for a condition broken, which abolishes the intermediate seisin.

¹¹⁴ 1 Brownl. 127; Fitzherbert, Nat. Brev. 149 J.

¹¹⁵ Stoughton v. Leigh, 1 Taunt. 402. See also Coates v. Cheever, 1 Cow. N. Y. 478; Billings v. Taylor, 10 Pick. Mass. 460; Stevens v. Stevens, 3 Dan. Ky. 71.

¹¹⁶ Stoughton v. Leigh, 1 Taunt. 401.

¹¹⁷ Litt. sec. 393.

¹¹⁸ Evans v. Webb, 1 Yeates, Penn. 425; Pringle v. Gaw, 5 Serg. & R. Penn. 536; Shotman v. Ledam, 3 Ohio, 13; Moore v. Gilliam, 5 Munf. Va. 346; Sheaff v. O'Neil, 9 Mass. 14; Learned v. Cutter, 18 Pick. Mass. 9; Cox v. Jagger, 2 Cow. N. Y. 639; Moore v. New York, 9 N. Y. 110; Greene v. Putnam, 1 Barb. N. Y. 500.

¹¹⁹ Strong v. Bragg, 7 Blackf. Ind. 62.

¹²⁰ Windham v. Portland, 4 Mass. 388.

¹²¹ Scott v. Hancock, 13 Mass. 168; Jones v. Brewer, 1 Pick. Mass. 317; Perk. s. 480.

¹²² Crabb, Real Prop. 155 § 1161, 1162.

¹²³ See Childs v. Smith, 1 Md. Ch. Dec. 483; Crockett v. Crockett, 2 Ohio St. 180; Padel-ford v. Padel-ford, 7 Pick. Mass. 152; Dalton v. Dalton, 7 Ired. Eq. No. C. 197.

¹²⁴ Litt. § 393; Coke, Litt. 240, b; Perk. § 311, 312, 317.

The right will not be defeated either because there are no heirs, as in the case where the husband had a fee and the land escheated, or where there are no heirs qualified to take the inheritance; as, where a tenant in tail dies without heirs, by which the inheritance reverts to the donor; in these and such cases the widow shall not be defeated of her dower.¹²⁶

The title of the wife to dower may be defeated in general by a mortgage or other incumbrance subsisting before the right to dower attaches, and which would destroy the husband's seisin. And, it is said, it will be destroyed by the foreclosure of a mortgage given by the husband *eo instanti* with receiving the conveyance, and which was a part of the agreement.¹²⁶

1764. After dower has attached by the seisin of the husband, it may be defeated in a variety of ways:

The most common way of barring dower in the United States is by a conveyance of the estate to a purchaser in which the husband and wife join. This is done by a deed, acknowledged according to the form required in the state or territory where the land is located.¹²⁷ But a conveyance by the husband alone will not affect her rights, the alienee taking subject to them.

By the statute of Westm. 2, 13 Edw. 1, the principles of which have been re-enacted or adopted in the United States generally, with modifications, adultery in the wife, accompanied with elopement, is punished by a loss of dower.¹²⁸

Dower is barred by a divorce *à vinculo*, but not by a divorce *à mensa et thoro*.¹²⁹

It is barred by the widow's acceptance of an interest in the dowable estate which is inconsistent with her right to dower; this being considered a satisfaction.

The wife is barred when she takes a devise or legacy under the will of her husband instead of dower.¹³⁰ But a widow who makes an election to take under her husband's will, under a mistaken supposition that the estate which she accepts in lieu of dower is unincumbered, and it is afterward made liable for her husband's debts, will be relieved in equity.¹³¹

She is barred when she accepts a jointure, the nature of which will be explained hereafter.

Her dower will of course be defeated by her release after her husband's death,

¹²⁶ Brooke, Abr. *Tenures*, pl. 33; *Dower*, pl. 36.

¹²⁶ In Pennsylvania, a judicial sale for the payment of debts, or under a mortgage given by the husband alone, *bona fide*, will defeat the widow's right of dower. *Reed v. Morrison*, 12 Serg. & R. Penn. 21; *Keller v. Michael*, 1 Yeates, Penn. 300. See before, **1740**.

¹²⁷ See Bouvier, Law Dict. *Acknowledgment*.

¹²⁸ Tudor, Lead. Cas. 51; Govier v. Hancock, 6 Term, 603; Hethington v. Graham, 6 Bingh. 135; Cogswell v. Tibbets, 3 N. H. 41; Stegall v. Stegall, 2 Brock. C. C. 256; Le-compte v. Wash, 9 Mo. 551; Walters v. Jordan, 13 Ired. No. C. 361; Bell v. Neal, 1 Bail. So. C. 312. But see Reynolds v. Reynolds, 24 Wend. N. Y. 193; Lakin v. Lakin, 2 All. Mass. 45.

¹²⁹ 2 Sharswood, Blackst. Comm. 130. In some of the states, by statutory directions, the courts are required to make a reasonable provision out of the husband's estate for the wife when a divorce is granted, and she is not in fault. See Waite v. Waite, 4 Barb. N. Y. 12; Whitsell v. Mills, 6 Ind. 229; McCraney v. McCraney, 5 Iowa, 232; Davol v. Howland, 14 Mass. 219; 4 Kent, Comm. 54.

¹³⁰ Cauffman v. Cauffman, 17 Serg. & R. Penn. 16; Duncan v. Duncan, 2 Yeates, Penn. 305; Adsit v. Adsit, 2 Johns. Ch. N. Y. 452; Reed v. Dickerman, 12 Pick. Mass. 151; Chapin v. Hill, 1 R. I. 446; Kennedy v. Mills, 13 Wend. N. Y. 553; Corriell v. Ham, 2 Iowa, 558; Sanford v. Jackson, 10 Paige, Ch. N. Y. 266; Pollard v. Pollard, 1 All. Mass. 490; Raines v. Corbin, 24 Ga. 185; Pemberton v. Pemberton, 29 Mo. 408.

¹³¹ Kidney v. Coussmaker, 12 Ves. Ch. 143; Hastings v. Clifford, 32 Me. 132; Thompson v. Egbert, 2 Harr. N. J. 459; Thomas v. Wood, 1 Md. Ch. Dec. 296; Chew v. Farmers' Bank, 9 Gill, Md. 361; Martin v. Martin, 22 Ala. N. s. 86.

but a release made to him during the coverture is not valid;¹³³ and release to him before marriage is void.¹³³

Dower will be barred by taking lands under the exercise of the right of eminent domain, or by dedication of the land to public uses.¹³⁴

1765. The next estate for life is the estate of *jointure*.¹³⁵ In England jointures are regulated by the stat. 27 Hen. VIII, c. 10, commonly called the statute of uses.

1766. A *jointure* is a competent livelihood of freehold for the wife, of lands and tenements, to take effect in profit or possession presently after the death of the husband, for the life of the wife at least.¹³⁶

1767. To make a good jointure it must be attended with the following circumstances, namely:

It must take effect, in possession or profit, immediately from the death of the husband.

It must be for the wife's life, or for some greater estate, and not for an estate *pur autre vie*, for a term of years, or any less estate.

It must be limited to the wife herself, and not to any other in trust for her.

It must be in satisfaction of the wife's dower, and not of a part only.

The estate limited to the wife must be expressed or averred to be in satisfaction of her whole dower.

It must be made before marriage.¹³⁷

1768. The estate which has just been described is a jointure at law. In equity, any provision which a woman accepts before marriage in satisfaction of dower, as, for instance, a trust estate, or a mere personal covenant of the husband, may constitute a good jointure.

A jointure in equity does not require all the particularities of a jointure at law. It will be good if the following circumstances concur:

If it be made before marriage.

If the thing accepted be taken in lieu of dower; but it is not requisite that it should be an estate of freehold to continue during the life of the wife at least.

Though to be binding, at law, a jointure must be expressed in the deed to be in satisfaction of dower, yet if such was the intent it will be binding in equity.¹³⁸

1769. The interest which at law the jointress has in her jointure cannot be for less than life, although it may be for more. Her estate is somewhat like that of a dowress, but there is some difference between them.

Like a tenant in dower, the jointress is entitled to emblements, but she is not entitled to the emblements upon the lands at her husband's death, for the jointure is not, like dower, a continuance of the husband's estate.¹³⁹

A jointress may grant leases for years or for her own life.

In case of eviction from her jointure she is immediately restored to her right to dower, either entirely or in proportion to the value of the lands evicted,

¹³² Rowe v. Hamilton, 3 Me. 63; Carson v. Murray, 3 Paige, Ch. N. Y. 483; Martin v. Martin, 22 Ala. N. S. 104.

¹³³ Croade v. Ingraham, 13 Pick. Mass. 33; Vance v. Vance, 21 Me. 364.

¹³⁴ Moore v. New York, 4 Sandf. N. Y. 456, 9 N. Y. 110; Gwynne v. Cincinnati, 3 Ohio, 24.

¹³⁵ See Bacon, Abr.; 2 Sharswood, Blackst. Comm. 137; Cruise, Dig. t. 7; Perk.; Comyn. Dig.

¹³⁶ Coke, Litt. 36; Vance v. Vance, 21 Me. 364.

¹³⁷ Bacon, Abr. *Dower & Jointure*, G; McCartee v. Teller, 2 Paige, Ch. N. Y. 562.

¹³⁸ See the cases of Gibson v. Gibson, 15 Mass. 106; Vincent v. Spooner, 2 Cush. Mass. 473; Thompson v. McGaw, 1 Metc. Mass. 66; Gaugivere's Estate, 14 Penn. St. 417; Spiva v. Jeteo, 9 Rich. Eq. So. C. 434; Chapin v. Hill, 1 R. I. 450; Andrews v. Andrews, 8 Conn. 79; McCartee v. Teller, 2 Paige, Ch. N. Y. 511; Swaine v. Perrine, 5 Johns. Ch. N. Y. 489, for a variety of cases in which jointures have been the subject of litigation.

¹³⁹ Viner, Abr. 373, pl. 82.

whether such eviction take place before or after her husband's death, and notwithstanding an acceptance by the widow of the remaining portions of the lands.

A jointress will be restrained from committing waste.

1770. When a legal jointure has been made before marriage, it is a complete bar to dower. But when the jointure is created afterward, the widow has a right to elect whether she will take the jointure or claim the dower, and she will not be required to make the election until she has had an opportunity to ascertain their respective values.

In order to bar dower, however, the jointure must be a substantial one, and not merely illusory. If, therefore, the widow be evicted from the lands given her in jointure, she shall have a right to claim dower from her husband's estate; and if she be evicted only in part, she shall have dower for the part which she has lost; and it is immaterial whether the eviction take place before or after the husband's death.¹⁴⁰

1771. A jointure may be lost in various ways, the principal of which are:

By a joint deed by herself and her husband,¹⁴¹ though the husband alone cannot affect it by his acts.¹⁴² But if the jointure be created after the marriage, the right of the wife to dower will not be barred by such a conveyance, because in that case the wife has her election after the husband's death.

Though in England the wife does not lose her jointure by elopement and adultery, and the rule is perhaps the same in some of the United States, yet in others she will lose it for that cause.

1772. When the husband by his will devises an estate to his wife at common law, it is no bar to her dower nor to her jointure, the latter of which is considered as coming in the place of and having the same privileges as dower. Though in some states by statute the wife is put to her election to take under the will or her dower, but she cannot have both unless the will of the testator is manifestly that she shall have both.

1773. By the awkward phrase of *an estate tail after possibility of issue extinct*, justified by Blackstone, is meant the estate which is thus described by Littleton: ¹⁴³ "When tenements are given to a man and his wife in special tail, if one of them die without issue, the survivor is tenant in tail after possibility of issue extinct."

This estate, says Blackstone,¹⁴⁴ must be created by the act of God, that is, by the death of that person out of whose body the issue was to spring, for no limitation, conveyance, or other human act can make it. For, if land be given to a man and his wife and the heirs of their two bodies begotten, and they are afterward divorced *à vinculo matrimonii*, they shall neither of them have the estate, but be barely tenants for life, notwithstanding the inheritance once vested in them. A possibility of issue is always supposed to exist in law until it is extinguished by the death of the parties, even though the donees be each of them one hundred years old.

¹⁴⁰ Gervoye's Case, F. Moore, 717; Coke, Litt. 33, a, n. 8. See Glegg v. Glegg, 2 Eq. Cas. Ab. 27; Speake v. Speake, 1 Vern. Ch. 218.

¹⁴¹ 2 Ves. Ch. 261; Teu v. Winterton, 1 Ves. Ch. 451.

¹⁴² Towers v. Davis, 1 Vern. Ch. 479.

¹⁴³ Littleton, § 32.

¹⁴⁴ 2 Sharswood, Blackst. Comm. 124.

CHAPTER XX.

ESTATES LESS THAN FREEHOLD.

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- 1778-1784. Creation of an estate for years.
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1774. Having considered estates of freehold of inheritance and estates of freehold not of inheritance it will be proper now to inquire into the nature of estates less than freehold. These are, estates for years, estates at will, and estates at suffrance.

1775. *An estate for years* is one created by a lease for years, which is a contract for the possession and profits of land for a determinate period, by which the lessor agrees that the lessee shall have the possession and profits of the land, and the lessee or tenant promises, in return, to pay a rent or recompense for the same.

By the word years must be understood not two or more years, but any definite period of time. An estate is deemed an estate for years, though the term should exceed the limits of human life, as a lease for five hundred years; and it is also considered an estate for years, though it may be only for half a year or even a less period of time.

1776. An estate for years is also called a term of years, a term signifying not only the limits of time, but also the estate or interest which passes for that

period; because its duration or continuance is bounded, limited, and determined. Every such estate must have a certain beginning and a certain end. It matters not by what words it may have been created; when it must expire at a certain period, it is an estate for years.¹

1777. This estate may be of much longer duration than a life estate, and yet it is not a freehold, but a mere chattel interest. An estate granted to a man at the age of ninety years for his life is a freehold, because it is uncertain when it will end or determine; while an estate for a thousand years is but a chattel interest, because its end is certain.

1778. *An estate for years may be created by deed, or in writing not under seal, or by parol.* The act of granting the estate is called a demise; the instrument or agreement by which it is granted is a lease.

A lease is a contract for the possession and profits of lands and tenements on one side, and a recompense of rent or other income on the other.² The instrument is also known by the name of lease; and this word sometimes signifies the term or time for which the estate is to last; for example, the owner of land containing a quarry, leases the quarry for ten years, and then conveys the land, "reserving the quarry until the end of the lease;" in this case the reservation remained in force until the ten years expired, although the lease was cancelled by mutual consent within the ten years.³

1779. This contract resembles several others in many particulars; it is like a sale, to constitute which there must be a thing sold, a price for which it is sold, and the consent of the parties as to both; so in a lease there must be a thing leased, the price or rent, and the consent of the parties as to both. Again, a lease resembles the contract of hiring of a thing, *locatio conductio rei*, where there must be a thing to be hired, a price or compensation called the hire, and the consent or agreement of the parties respecting both.

1780. To make such contract, there must be a lessor able to grant the land, a lessee capable of accepting the grant, and a subject matter capable of being granted.

1781. Before proceeding to the examination of the several parts of a lease it will be proper here to point out a difference between an agreement for a lease and the lease itself. When an agreement for a lease contains words of present demise, and there are circumstances from which it may be collected that the tenant should have an immediate legal interest in the term, such an agreement will amount to an actual lease; but although words of present demise are used, if it appear on the whole that no legal interest was intended to pass, and that the agreement was only preparatory to a future lease to be made, the construction will be governed by the intention of the parties, and the contract will be held to amount to no more than an agreement for a lease.⁴

¹ It is not to be understood that it is necessary, to create a term, that any certain number of years must be named as the absolute and only limit of the estate. Thus an estate to A during his minority would be good as an estate for years. A lease for seven or fourteen years, and a devise for the payment of debts or until the devisors debts are paid, have been held to create a term for years. *Burton, Real Prop.* § 487; *Doe v. Dixon*, 9 East, 15; *Dunn v. Cartright*, 4 *id.* 29. The only necessary circumstance is that a precise time shall be fixed for the continuance of the term, so that, when the commencement of the term is ascertained, the period of determination by efflux of time may be known with certainty. 1 *Washburn, Real Prop.* 295; and see *Horner v. Leeds*, 1 *Dutch. N. J.* 106.

² *Bacon, Abr. Leases.*

³ *Farnum v. Platt*, 8 *Pick. Mass.* 339; 2 *Sharswood, Blackst. Comm.* 144.

⁴ It is difficult, if not impossible, to reconcile the cases, and reference is here made to a few important ones. In the following cases the terms used were held to create a term. *Alderman v. Neate*, 4 *Mees. & W. Exch.* 719; *Chapman v. Buck*, 5 *Scott*, 529; *Doe v. Benjamin*, 9 *Ad. & E.* 644; *Thornton v. Payne*, 5 *Johns. N. Y.* 74; *Averill v. Taylor*, 9 *N. Y.* 44;

Having made these preliminary observations, let us now consider by what words a lease may be made, its several parts, and the formalities the law requires.

1782. *The most proper words to be used* are demise, grant, and to farm let; these have a technical meaning and are well understood; but whenever the words are sufficient to explain the intention of the parties, that the one shall divest himself of the possession and the other come into it, for a certain determinate time, whether they run in the form of a license, or covenant, or agreement, they will themselves be sufficient, and, in construction of law, will amount to a lease for years as effectually as if the most proper and pertinent words had been used for that purpose.⁵

When lands are let upon shares for a single crop only, this does not amount to a lease, and, in that case, the possession remains with the owner.⁶ When, however, it is manifest by the contract that the tenant shall possess the land, with the usual privilege of exclusive enjoyment, it is the creation of a tenancy for years, though the land be taken to be cultivated upon shares.⁷

1783. A formal lease in writing by deed consists of the following *parts*, namely: the premises; the habendum; the tenendum; the reddendum; the covenants; the conditions; the warranty; the date; and the seal.

But a lease is equally good though it be not formal.

1784. As to their *forms*, leases may be in writing under seal; or in writing not under seal; or they may be made orally, without writing.

When the lease is under seal, it must, of course, be sealed, and it should also be signed by the parties; and whether under seal or not, it must be delivered in order to give it all its efficacy. But almost any manifestation of an intention to deliver it will be sufficient; such a lease will carry the estate for any length of time whatever, particularly when under seal.

By the English statute of frauds of 29 Car. II, c. 3, s. 1, 2 and 3, it is declared that "all leases, estates, or terms of years, or any uncertain interest in lands, created by livery only, or by parol, and not put in writing and signed by the party, should have the force and effect of leases or estates at will only, except leases not exceeding the term of three years, whereupon the rent reserved during the term shall amount to two third parts of the full improved value of the thing demised." "And that no lease or estate, either of freehold or term of years, should be assigned, granted, or surrendered, unless in writing."⁸

The principles of this statute, as far as regards parol leases, have been reenacted or adopted in most of the states of the Union.

Whitney v. Allaire, 1 *id.* 305; Weed v. Crocker, 13 Gray, Mass. 219; Bacon v. Bowdoin, 22 Pick. Mass. 401.

In these cases the terms used were held to constitute an agreement for a term. Pinero v. Judson, 6 Bingham, 206; Jones v. Reynolds, 1 Q. B. 517; Aikin v. Smith, 24 Vt. 172; People v. Gillis, 24 Wend. N. Y. 201; Jackson v. Eldridge, 3 Stor. C. C. 325; Buell v. Cook, 4 Conn. 238.

⁵ Bacon, *Abr. Leases*, K; Watson v. O'Hern, 6 Watts, Penn. 362; Fiske v. Framingham, 14 Pick. Mass. 493; Maverick v. Lewis, 3 M'Cord, So. C. 211; Mosher v. Reding, 12 Me. 478; Kider v. Lafferty, 1 Whart. Penn. 314; 5 Rand. Va. 571; 1 Root, Conn. 318. And when proper words to create an estate for years have been used they may be controlled by the connection in which they are used. Putnam v. Wise, 1 Hill, N. Y. 234; Walker v. Fitts, 24 Pick. Mass. 191; Doe v. Deeny, 9 Carr. & P. 494.

⁶ Hare v. Celey, Croke, Eliz. 143; Bradish v. Schenck, 8 Johns. N. Y. 151; Bishop v. Doty, 1 Vt. 37.

⁷ Jackson v. Brownell, 1 Johns. N. Y. 267.

⁸ Den v. Johnson, 3 Green, N. J. 116; Allen v. Jacquish, 21 Wend. N. Y. 635; Richardson v. Bates, 8 Ohio, St. 260; Olmstead v. Niles, 7 N. H. 526. Under the statute sealing is not necessary. In some of the states leases for a term of one year must be in writing. And in some leases for a term of five years or of seven years must be sealed and recorded.

1785. *The tenant for years is entitled to the free and undisturbed use of the premises during the term; to estovers; and to emblements.*

1786. In treating of the lessor's right to the rent, we considered the effects of a disturbance of the lessee's possession by the lessor, or of his eviction from the whole or a part of the demised premises. It will not now be requisite to go over the same ground.⁹

1787. Every tenant for years has incident to and inseparable from his estate, unless restrained by special agreement, the same estovers to which a tenant for life is entitled.¹⁰

1788. Emblements are not invariably incident to an estate for years; a lessee for years is in some cases entitled to them, but in other cases he is not so entitled. The rule is, that when the estate determines by the act of God, or of the law, between the time of sowing and reaping, the tenant shall be entitled to the crops.¹¹ The tenant for years is also entitled to emblements, for the same reason that he could not foresee the determination of his estate, when his term is ended by the act of another; as, where a tenant for life grants an estate for years, and afterward by his own act puts an end to the life estate.¹²

1789. A lessee for years may part with his whole estate by an assignment of his whole lease, or a part of it, by underletting a part of the premises, unless restrained by his lease.¹³ And the assignee may again assign it to others. In the first case the lessee will continue to be liable to the lessor for the rent on his covenant;¹⁴ and the assignee will be liable in debt on account of the privity in estate.¹⁵ But when the assignee transfers his term he will no longer be liable personally, for he never was responsible except in respect of the land.

A sub-lessee is not liable to the lessor in any form of action.¹⁶

1790. *The principal obligations of a tenant for years are the following:*

The tenant or lessee is bound to pay the rent agreed upon and to perform all the covenants which he has undertaken to fulfil.

In the absence of all express agreements the tenant is always required to do the necessary repairs;¹⁷ he is therefore bound to put in windows or doors that have been broken by him, so as to prevent any decay of the premises, but he is not required to put a new roof on an old, worn-out house.¹⁸

⁹ Consult also the cases of *Tone v. Brace*, 8 Paige, Ch. N. Y. 597; *Mayor v. Malie*, 13 N. Y. 160; *Maule v. Ashmead*, 20 Penn. St. 482; *Ross v. Dysart*, 33 *id.* 452; *Lovering v. Lovering*, 13 N. H. 513; *Hamilton v. Wright*, 28 Mo. 199; *Dexter v. Mauley*, 4 Cush. Mass. 24; *Wade v. Halligan*, 16 Ill. 507.

¹⁰ *Harris v. Gosling*, 3 Harr. Del. 340.

¹¹ In Pennsylvania, the tenant is entitled to the way-going crop. *Stultz v. Dickey*, 5 Binn. Penn. 285; *Dene v. Bossler*, 1 Penn. 225. The rule is the same in New Jersey. *Van Dorens v. Everitt*, 2 South. N. J. 462.

¹² *Crabb, Real Prop.* § 1469.

¹³ *Robinson v. Perry*, 21 Ga. 183; *University v. Joslyn*, 21 Vt. 52; *McFarlan v. Watson*, 2 N. Y. 286; *Wooden v. Butler*, 10 Miss. 716.

¹⁴ *Campbell v. Stetson*, 2 Metc. Mass. 504; *Dewey v. Dupuy*, 2 Watts & S. Penn. 556; *Wollaston v. Hakewill*, 3 Mann. & G. 297; *Frank v. Maguire*, 42 Penn. St. 77.

¹⁵ *McKeon v. Whitney*, 3 Den. N. Y. 352; *Fisher v. Milliken*, 8 Penn. St. 111; *Toney v. Walls*, 3 Cush. Mass. 442; *Marney v. Byrd*, 11 Humphr. Tenn. 95; *Pingrey v. Watkins*, 15 Vt. 479; *Sanders v. Benson*, 4 Beav. Rolls 350; see *Gray v. Rawson*, 11 Ill. 527.

¹⁶ *McFarlan v. Weston*, 3 N. Y. 286; *Dartmouth College v. Clough*, 8 N. H. 22; *Campbell v. Stetson*, 2 Metc. Mass. 504.

¹⁷ *Woodford, Landl. & T.* 244; *Archbold, Landl. & T.* 188; *Mumford v. Brown*, 6 Cow. N. Y. 475; *Morse v. Maddox*, 17 Mo. 569; *Kramer v. Cook*, 7 Gray, Mass. 553; *Libby v. Tolford*, 48 Me. 316; *Buck v. Pike*, 27 Vt. 529.

¹⁸ *Ferguson v. —*, 2 Esp. 590; *Phillips v. Monger*, 4 Whart. Penn. 226; *Long v. Fitzsimmons*, 1 Watts & S. Penn. 530; *Caulk v. Everly*, 6 Whart. Penn. 303; see *Connell v. Vanartsdalen*, 4 Penn. St. 364; *Cleves v. Willoughby*, 7 Hill, N. Y. 83; *City Council v. Moorhead*, 2 Rich. So. C. 430. As to the effect of some of the common cove-

When a house has been destroyed by an accidental fire neither the landlord nor the tenant is bound to rebuild, unless obliged by some special agreements to do so.¹⁹

He cannot deny his landlord's title, nor can a sub-tenant do so.

At the end of his term, the tenant for years is bound to surrender the inheritance to the lessor in the same order he got it, the natural tear and wear excepted.

1791. *An estate for years may be lost in several ways: by destruction of the property, by merger, by surrender, by release, by forfeiture, by notice, by expiration of the lessor's right, or by judgment.*

1792. When the property has been *destroyed*, the estate for years is lost, as a matter of course; as, if a piece of land were let, and by an earthquake or other calamity it should be destroyed, the owner would lose his inheritance and the tenant for years his estate, according to the rule *res perit domino*.²⁰

1793. A second way of losing an estate for years is by *merger*; as, when there is a union of the freehold or fee and a term of years in one person, at the same time and in the same right, without any intermediate estate, the lesser estate is merged or drowned in the greater, because they are inconsistent and incompatible.²¹

The estate in which the merger takes place is not enlarged by the accession of the preceding estate; and the greater or only subsisting estate continues after the merger precisely of the same quantity and extent of ownership as it was before the accession of the estate which was merged, and the lesser estate is extinguished.²²

The merger is produced either by the meeting of an estate of higher degree with an estate of inferior degree; or by the meeting of a particular estate and the immediate reversion in the same person.

1794. By *surrender* is understood the yielding up of an estate for life or years to him who has an immediate estate in reversion or remainder, by which the lesser is merged into the greater by mutual agreement.²³ A surrender is of a nature directly opposite to a release; for the latter operates by the greater estate descending upon the less; the former is the falling of a less estate into a greater by deed. A surrender immediately divests the estate of the surrenderer, and vests it into the surrenderee, even without the assent of the latter.²⁴

The proper words of this conveyance are *surrender and yield up*; but any form of words by which the intention of the parties is sufficiently manifested will operate as a surrender.²⁵

The surrender must be by deed or some note in writing.²⁶ But the surren-

nants restricting this general liability, see *Mills v. Bache*, 24 Wend. N. Y. 254; *Wall v. Hinds*, 4 Gray, Mass. 256; *Bigelow v. Collamore*, 5 Cush. Mass. 226; *Hess v. Newcomer*, 7 Md. 325.

¹⁹ 2 Platt, Leases, 182; *Horsefall v. Mather*, Holt, Nisi P. 7; *Post v. Vetter*, 2 E. D. Smith, N. Y. 248; *Lansing v. Stone*, 37 Barb. N. Y. 21; *Welles v. Castles*, 3 Gray, Mass. 323; *Wainscott v. Silvers*, 13 Ind. 497; *Abby v. Billups*, 35 Miss. 618.

²⁰ *Winton v. Cornish*, 5 Ohio, 477; *Stockwell v. Hunter*, 11 Metc. Mass. 448; *Alexander v. Dorsey*, 12 Ga. 12; *Graves v. Berdan*, 29 Barb. N. Y. 100.

²¹ *Preston*, Conv.; *Bacon*, Abr. *Leases*, R.; *Coke*, Litt. 338, b, note (4); *Jones v. Davies*, 5 Hurlst. & N. Exch. 766; *Clift v. White*, 19 Barb. N. Y. 70; *Wilson v. Gibbs*, 28 Penn. St. 151; *Smiley v. Van Winkle*, 6 Cal. 605.

²² *Preston*, Conv. 7.

²³ *Coke*, Litt. 337, b; *Greider's Appeal*, 5 Penn. St. 422; *Curtis v. Miller*, 17 Barb. N. Y. 477; *Bailey v. Wells*, 8 Wisc. 158.

²⁴ *Sheppard*, Touchst. 300; *Allen v. Jaquish*, 21 Wend. N. Y. 628; *Bailey v. Wells*, 8 Wisc. 121; *Shepard v. Spaulding*, 4 Metc. Mass. 416.

²⁵ *Perk. s. 607*; *Comyn*, Dig. *Surrender*, A; *Greider's Appeal*, 5 Penn. St. 422.

²⁶ *Ward v. Lumley*, 5 Hurlst. & N. Exch. 88; *Brady v. Peiper*, 1 Hilt. N. Y. 61.

der may be oral where the term is of such duration that the lease might be oral.²⁷

The surrender may be express or may be implied from acts inconsistent with the continuance of the lease. Thus where a lessee takes a new lease of the same premises to take effect before the expiration of the term,²⁸ or leases back the premises to his lessor,²⁹ or abandons possession, which is thereupon taken by the lessor,³⁰ it is held that a surrender takes place.

1795. We have seen that by a surrender the estate for years is destroyed by being merged in the estate in fee or the reversion; on the contrary, a release passes the fee or reversion to the releasee, by which he who holds the estate for years as the tenant holds the fee. A *release* is defined to be "a conveyance of a man's interest or right, which he hath unto a thing, to another that hath the possession thereof, or some interest therein."³¹

1796. A fifth mode of destroying an estate for years is by *forfeiture*. This may happen in several ways, the principal of which are the following:

When the lessee disaffirms the title of his lessor by matter of record; as, when he sues out a writ, or resorts to a remedy, which supposes him to have a higher interest in the land.³²

There is a forfeiture where the tenant disclaims the tenancy; as, by attorning to a stranger,³³ or by a refusal to pay rent on the ground that another person had ordered him not to pay it, for this is evidence of disclaimer of the tenancy;³⁴ but the payment of rent to a third person, without more, does not amount to a disclaimer, so as to operate a forfeiture.³⁵

1797. A forfeiture of an estate for years may happen by a breach of a condition, for the lessor having the *jus disponendi* may annex what conditions he pleases to his grant, provided they are not illegal nor repugnant to the grant itself, and upon the breach of any such express condition he may avoid the lease. Conditions of this sort are generally inserted in leases, with a view to secure the payment of the rent, to prevent the commission of waste, and to restrain the alienation of the estate for years without the consent of the lessor.³⁶

1798. In order to secure himself, the lessor frequently reserves the right of re-entry for breach of any such conditions. Great care must be observed in making the re-entry, or the whole proceeding will be null.

The most common case of making such a re-entry is for the non-payment of rent; this kind of re-entry will be alone considered in this place. Unless they have been dispensed with by the agreement of the parties, several things are required to be done by the lessor before he can re-enter.

²⁷ *Kiester v. Miller*, 25 Penn. St. 481; *McKinney v. Reeder*, 7 Watts, Penn. 124; and see *Thomas v. Cook*, 2 Barnw. & Ald. 119.

²⁸ *McDonnell v. Pope*, 9 Hare, Ch. 705; *Lyon v. Reed*, 13 Mees. & W. Exch. 304; *Liv- ington v. Potts*, 16 Johns. N. Y. 28.

²⁹ *Shepard v. Spaulding*, 4 Metc. Mass. 416; see *Sperry v. Sperry*, 8 N. H. 477; *Baker v. Pratt*, 15 Ill. 568.

³⁰ *Dodd v. Acklom*, 6 Mann. & G. 673; *Grimman v. Legge*, 8 Barnw. & C. 324; *Hegeman v. McArthur*, 15 N. Y. 149; *Stotesbury v. Vail*, 2 Beasli. N. J. 390; *Patchin v. Dickerman*, 31 Vt. 666.

³¹ *Sheppard, Touchst.* 320.

³² *Bacon, Abr. Leases*, T. 2; *Saunders v. Freeman*, Dy. 209, pl. 21.

³³ *Willison v. Watkins*, 3 Pet. 49; *Jackson v. Vincent*, 4 Wend. N. Y. 633; *Montgomery v. Craig*, 3 Dan. Ky. 101.

³⁴ *Doe v. Pitman*, 2 Nev. & M. 673.

³⁵ *Doe v. Parker*, Gow, 180; 3 Pet. 49; *Clark v. Everly*, 8 Watts & S. Penn. 232; *Campbell v. Proctor*, 6 Me. 12; 4 Wend. N. Y. 633; *Jackson v. Harper*, 5 Wend. N. Y. 246; *Byrne v. Beeson*, 1 Dougl. Mich. 179.

³⁶ *Burton*, Real Prop. § 852, n; 1 Washburn, Real Prop. 317, *et seq.*; *Jones v. Carter*, 15 Mees. & W. Exch. 715; *Clark v. Jones*, 1 Den. N. Y. 516; *Burden v. Thayer*, 3 Metc. Mass. 76; *Spear v. Fuller*, 8 N. H. 174; *Gomber v. Hackett*, 6 Wisc. 323.

There must be a demand of the rent.³⁷

The demand must be made for the sum actually due, for a demand of more or less will avoid the entry.³⁸ If a part of the rent be paid, a re-entry may be made for the part unpaid.³⁹

It must be made on the day when the rent is due and payable by the lease to save the forfeiture.⁴⁰

It must be made a short time before sunset, that the money may be counted, and a receipt given, while there is light enough reasonably to do so.⁴¹

It must be made upon the land, and at the most notorious place of it;⁴² unless a place is appointed where the rent is payable, in which case a demand must be made at such place, for the presumption is that the tenant is there to pay it.⁴³

A demand must be made in fact, although there should be no person at the place of demand ready to pay it.⁴⁴

When these prerequisites have been observed by the lessor or reversioner, and the tenant neglects or refuses to pay the rent in arrear, if no sufficient distress can be found on the premises, the lessor or reversioner must re-enter.⁴⁵ This is done by going openly upon the premises, before the witnesses he may have prepared for the purpose, and declaring that for the want of sufficient distress, and because of the non-payment of the rent demanded, mentioning the amount, he re-enters and repossesses himself of the premises.

A tender of the rent on the last day, either on or off the premises, will save the forfeiture;⁴⁶ and, even when it has been incurred, the lessor may, either by his express agreement or by his acts, waive the forfeiture; as, for example, when the lessor receives rent from the lessee which has accrued since the forfeiture took place.⁴⁷

1799. When a tenant for years holds his estate by agreement from year to year, as long as both parties please, until there is a dissent, the estate will continue.⁴⁸

³⁷ Comyn, Dig. *Rent*, D, 3, a; Bacon, Abr. *Rent*, H; 18 Viner, Abr. 482; Doe v. Wandlass, 7 Term, 117; Duppa v. Mayo, 1 Saund. 287, n. 16.

³⁸ Doe v. Paul, 3 Carr. & P. 613; McCormick v. Connell, 6 Serg. & R. Penn. 151; Sperry v. Sperry, 8 N. H. 477; Conner v. Bradey, 1 How. 211.

³⁹ Bacon, Abr. *Conditions*, O, 4; Coke, Litt. 203.

⁴⁰ Bacon, Abr. *Rent*, 1; Comyn, Dig. *Rent*, D, 7; McMurphy v. Minot, 4 N. H. 251; Jones v. Reed, 15 id. 68; Mackubin v. Wheteroft, 4 Harr. & M'H. Md. 135; Remsen v. Concklin, 18 Johns. N. Y. 447; Bradstreet v. Clark, 21 Pick. Mass. 389.

⁴¹ See Chapman v. Wright, 20 Ill. 120; McQuesten v. Morgan, 34 N. H. 400; Kimball v. Rowland, 6 Gray, Mass. 224; Phillips v. Doe, 3 Ind. 132; Gaskill v. Trainer, 3 Cal. 334; Smith v. Whitbeck, 13 Ohio St. 471; Bowman v. Foot, 29 Conn. 331.

⁴² 2 Rolle, Abr. 428.

⁴³ Comyn, Dig. *Rent*, D, 6; Bacon, Abr. *Rent*, I.

⁴⁴ Bacon, Abr. *Rent*.

⁴⁵ 6 Serg. & R. Penn. 151; Newman v. Rutter, 8 Watts, Penn. 51; 1 Saund. 287, n. 16. But see that in some states re-entry is not necessary where ejectment is brought. 1 Smith, Lead. Cas. 5th Am. ed. 70; Jackson v. Chrysler, 1 Johns. Cas. N. Y. 125.

⁴⁶ Haldane v. Johnson, 20 Eng. L. & Eq. 498; Sweet v. Harding, 19 Vt. 587.

⁴⁷ Such acceptance may be a waiver of forfeiture for breach of other conditions. Tryett v. Jeffreys, 1 Esp. 393; O'Keefe v. Kennedy, 3 Cush. Mass. 325; Bleeker v. Smith, 13 Wend. N. Y. 530; Gomer v. Hackett, 6 Wisc. 623; Banvilhet v. Battelle, 7 Cal. 454.

⁴⁸ Lesley v. Randolph, 4 Rawle, Penn. 123; Bedford v. McElherron, 2 Serg. & R. Penn. 50. This peculiar tenancy, from year to year as it is called, though classed here (and, as it is believed, properly, on account of its characteristic qualities) with estates for years, is really an outgrowth, by judicial legislation, from estates at will. As a matter of public policy, it was easily decided that estates at will should only be determined on the part either of landlord, Doe v. Porter, 3 Term, 13; Doe v. Watts, 7 Term, 83; or of tenant, Kightly v. Bulkley, Sid. 338, by reasonable notice. It came to be considered that six months was a reasonable notice; and the further requirement was made that the period of termination should coincide with the time of payment of rent. As rent was usually payable annually, or at least was in terms to be a specified sum per annum, this necessarily rendered the term one for a year; and if one year passed without a determination of the

This estate may be destroyed by a notice from the lessor to the lessee to quit the premises.⁴⁹

This notice is a request from the reversioner to the tenant to quit the premises leased and to give possession of the same to him, the reversioner, at a time therein mentioned. The requisites of this notice are that it be in legal form, given by the proper person, to the proper person, that it be served, that it be served in proper time.

1800. *It should contain a request from the lessor or reversioner to the tenant or person in possession to quit the premises which he holds from the lessor, which premises must be particularly described as being situate in the street, city, or place, or township, or county, and to deliver the same to him on a day certain, therein mentioned; generally, when a lease is for a year, the same day of the year on which the lease commences, but when there is some doubt as to the time when the lease is to expire, it is proper to add, "or at the expiration of the current year of your tenancy."*⁵⁰ It should be signed by the person giving it, or by some person authorized by him, dated, and directed to the tenant. The words of the notice must be clear and decisive, without any ambiguity, or giving an alternative to the tenant; as, "you are required to move, or pay ten per cent. more rent;" for if it be really ambiguous or optional, it will be invalid.⁵¹

1801. *The notice must be given by the party interested in the premises, or by his agent, properly appointed;*⁵² but if the notice be given by one who acts as an agent, it is sufficient if his authority be afterward recognized, and the notice is binding on the lessor.⁵³ As the tenant is to act upon the notice at the time it is given to him, it is necessary that it should be such as he may do so with

relation, it necessarily existed for another year. Hence the significance of the name, from year to year. *Smith, Land. & T.* 234. In this manner it has come to be adopted as a general rule that when there has been a demise of premises generally, without any specification of a term, with a reservation of rent, that such a letting is to be considered as a term from year to year. *Right v. Darby*, 1 Term, 159; *Lesley v. Randolph*, 4 Rawle, Penn. 123; *Ridgley v. Stilwell*, 28 Mo. 400; *Patton v. Axley*, 5 Jones, No. C. 440.

The rent may be reserved and measured either by the year or aliquot part of a year; or if paid (and such payment be not explained, *Doe v. Crago*, 6 C. B. 90) without any agreement, the tenancy will be created from year to year. *Squires v. Huff*, 3 A. K. Marsh. Ky. 17; *Lockwood v. Lockwood*, 22 Conn. 425; *Hall v. Wadsworth*, 28 Vt. 412; *Hunt v. Morton*, 18 Ill. 75; *Williams v. Dertrar*, 31 Mo. 1; *Crommelin v. Thiess*, 31 Ala. N. S. 419. And where the original demise was for a time certain, a holding over, although it is ordinarily a mere tenancy at sufferance; *Hemphill v. Flynn*, 2 Penn. St. 144; *Den v. Adams*, 7 Halst. N. J. 99; *Ellis v. Page*, 1 Pick. Mass. 43; *Vrooman v. McKaig*, 4 Md. 450; may be converted into a tenancy from year to year. *Jackson v. McLeod*, 12 Johns. N. Y. 182; *Barlow v. Wainwright*, 22 Vt. 88; *Laguereanne v. Dougherty*, 35 Penn. St. 45; *Moshier v. Reding*, 12 Me. 478; *Harkins v. Pope*, 10 Ala. 493; *Bacon v. Brown*, 9 Conn. 334; *De-Young v. Buchanan*, 10 Gill & J. Md. 149; *Whittemore v. Moore*, 9 Dan. Ky. 315; *Moore v. Beasley*, 3 Ohio, 294; *McKinney v. Peck*, 28 Ill. 174.

Such an estate has many of the qualities of a term for years. It may be assigned. *Bolting v. Martin*, 1 Campb. 317. The tenant may have trespass *quare clausum* against the lessor. *Moore v. Boyd*, 24 Me. 242. They have the same rights in respect to the acts of strangers. *Clark v. Smith*, 25 Penn. St. 437. And see *Izon v. Gorton*, 5 Bingh. N. C. 501.

⁴⁹ See *Logan v. Herron*, 8 Serg. & R. Penn. 459; *Hanchet v. Whitney*, 1 Vt. 315; *Jackson v. Salmon*, 4 Wend. N. Y. 327; *Lloyd v. Cozens*, 2 Ashm. Penn. 131; *Den v. Drake*, 2 Greene, Iowa, 523; *Den v. Blair*, 3 Greene, Iowa, 181; *Morehead v. Watkyns*, 5 B. Monr. Ky. 228; *Fahnestock v. Faustenauer*, 5 Serg. & R. Penn. 174.

⁵⁰ *Doe v. Butler*, 2 Esp. 589. But see that such an addition avoids the notice. *Mills v. Goff*, 14 Mees. & W. Exch. 72. That the notice must expire at the expiration of term, see *Lloyd v. Cozens*, 2 Ashm. Penn. 131; *Hanchet v. Whitney*, 1 Vt. 311; *Currier v. Baker*, 2 Gray, Mass. 224; *Prescott v. Elm*, 7 Cush. Mass. 346; *Godard v. Railroad*, 2 Rich. So. C. 346.

⁵¹ See *Doe v. Goldwin*, 2 Q. B. 143; *Doe v. Jackson*, Dougl. 175.

⁵² *Adams, Ej.* 120.

⁵³ *Goodtitle v. Woodward*, 3 Barnew. & Ald. 689.

safety, and it should be binding upon all the parties concerned at the time it was given. Where, therefore, several persons are jointly interested in the premises, they all must join the notice; and if any one of them be not a party at the time, no subsequent ratification by him will be sufficient by relation to render the notice valid.⁵⁴

1802. When the relation of lessor and lessee or landlord and tenant subsists, difficulties can seldom occur as to the party upon whom notice should be served. *It should be given to the tenant* of the party giving the notice, notwithstanding a part may have been underlet, or the whole of the premises may have been assigned;⁵⁵ unless, perhaps, the lessor has recognized the sub-tenant as his tenant, in which case the notice should be given to both.⁵⁶ When the premises are in possession of two or more joint tenants, or tenants in common, the notice should be to all; a notice addressed to all and served upon one only will, however, be a good notice.⁵⁷

1803. The lessor or landlord should prepare duplicate notices, both signed by himself, so as to make them both originals; or if there are several tenants, he should make as many originals as there are tenants, and one besides for himself; he should then procure one or more persons for witnesses, to whom he should show the notices he has prepared, and request them to compare the notices, so as to be certain they are all alike. The lessor, or person acting for him, should then go with the witnesses to the tenant and deliver to him, or, if he cannot be found, to a member of his family at his place of abode,⁵⁸ or on the premises of the tenant in possession,⁵⁹ one of the original notices thus prepared and compared.⁶⁰ For the purpose of identifying the notice in case of a dispute, the witnesses ought to endorse on the notice kept by the lessor the day and the manner in which it was served, and sign their names.

1804. Different rules obtain in the several states as to *the time when the notice should be given* before the expiration of the term. In some of them it must be half a year before the end of the current year;⁶¹ in others, a notice of three months is sufficient.⁶²

1805. Difficulties frequently arise as to the period of the commencement of the tenancy; and when a regular notice to quit on a particular day is given, and the time when the term began is unknown, the effect of such notice as to its being evidence or not of the commencement of the tenancy will depend upon the particular circumstances of its delivery. If the tenant, being applied to by his landlord respecting the time of the commencement of the tenancy, has informed him it began on a certain day, and in consequence of it a notice to quit on that day is given at a subsequent period, the tenant is concluded by his act, and will not be permitted to prove that in point of fact the tenancy has a different commencement; nor is it material whether the information be the result of design or ignorance, as the landlord is in both instances led into error.⁶³

⁵⁴ 2 Phillips, Evid. 184; 5 East, 491.

⁵⁵ Adams, Ejectm. 119; Pleasant v. Benson, 14 East, 234; Hatsfield v. Packard, 7 Cush. Mass. 245.

⁵⁶ Jackson v. Baker, 10 Johns. N. Y. 270.

⁵⁷ Adams, Ejectm. 123.

⁵⁸ Widger v. Browning, 2 Carr. & P. 523; Jones v. Marsh, 4 Term, 464.

⁵⁹ Alford v. Vickery, 1 Carr. & M. 280.

⁶⁰ 2 Phillips, Evid. 185.

⁶¹ In *Illinois*, Hunt v. Morton, 18 Ill. 75; *Kentucky*, Morehead v. Watkyns, 5 B. Monr. Ky. 228; *New York*, Jackson v. Bryan, 1 Johns. N. Y. 322; *New Jersey*, Den v. Drake, 2 Green N. J. 523; Den v. Blair, 3 id. 181; *North Carolina*, Den v. McIntosh, 4 Ired. No. C. 291; *Tennessee*, Trousdell v. Yarnall, 6 Yerg. Tenn. 431; and *Vermont*, Hanchet v. Whitney, 1 Vt. 315; Barlow v. Wainwright, 22 id. 88.

⁶² *New Hampshire*, Currier v. Perley, 24 N. H. 219; *Pennsylvania*, Logan v. Herron, 8 Serg. & R. Penn. 459; *South Carolina*, Floyd v. Floyd, 4 Rich. So. C. 23.

⁶³ Adams, Ejectm. 130; 2 Phillips, Evid. 186.

In like manner, when the landlord is induced by the tenant to believe that the tenancy commenced at a certain time at the time the notice is given, the tenant cannot afterward show that in fact it commenced at another time; as, where the tenant at the time of the delivery of the notice assented to its terms; but such assent must be strictly proved.⁶⁴

1806. When a regular notice has been given to a tenant from year to year, its effect is to put an end to the estate of the tenant while it is unrecalled and has not been waived. Numerous acts of the lessor will have the effect of recalling such notice; the principal of which are the receipt of rent such as accrued after the expiration of the term to which the notice applies,⁶⁵ bringing an action for use and occupation of the premises after such time, distraining for rent accrued afterward. These acts are conclusive upon the landlord, because they cannot be otherwise explained. But there are many acts which would have the effect of waiving the notice, but they are severally open to explanation; and the particular act will or will not be considered a waiver of the notice according to the circumstances which attend it.⁶⁶ It has been held that a notice to quit at the end of a certain year is not waived by the landlord's permitting the defendant to remain in possession an entire year after the expiration of the notice, notwithstanding the tenant held by an improving lease, that is, to clear and fence the land and pay the taxes.⁶⁷

1807. When the lessor has the fee simple, his heirs will be bound by all leases which he has made, whatever be their nature or their length; for as he had a right to dispose of the whole title, he might of course let the estate upon such terms as he pleased. But when a tenant for life makes a lease for a term which happens to extend beyond his life, it expires with the death of the tenant for life, for he could not make a lease to extend beyond the time for which he held the estate.

On the same principle, a guardian cannot make a lease to extend beyond the time when the ward shall attain his full age.⁶⁸

But we may remember that when the lease expires upon the happening of an uncertain event the tenant for years is entitled to the emblements.

1808. An estate for years may be lost by the judgment of a competent court, when its judgment is final, in an action between the lessor and the tenant for years where the judgment is rendered in favor of the lessor, or where a stranger recovers the land by title paramount.

1809. An estate at will is that which a tenant has by an entry made thereon under a demise, to hold during the joint wills of the parties to the same.⁶⁹ At common law all estates for an uncertain time were held to be estates at will, and such estates still exist, though courts are greatly inclined on all proper occasions to treat such estates as tenancies from year to year.⁷⁰ And a tenancy where no rent is reserved and no time fixed for determining the tenancy is still held a tenancy at will.⁷¹

⁶⁴ Phillipps, Evid. 183; Doe v. Lambly, 2 Esp. 635.

⁶⁵ Prindle v. Anderson, 19 Wend. N. Y. 391; 23 Wend. N. Y. 616; Norris v. Morrill, 43 N. H. 218; Collins v. Canty, 6 Cush. Mass. 415; Gomber v. Hackett, 6 Wisc. 323. And see Croft v. Lumley, 1 Ell. B. & E. 1069.

⁶⁶ Doe v. Humphreys, 2 East, 237; Whiteacre v. Symonds, 16 East, 13. See Boggs v. Black, 1 Binn. Penn. 333; Adams, Ejectm. 144.

⁶⁷ Boggs v. Black, 1 Binn. Penn. 333.

⁶⁸ May v. Calder, 2 Mass. 55. But the ward, after coming of age, may affirm such lease by acceptance of rent. Van Deren v. Everitt, 2 South. N. J. 469; Ross v. Gill, 4 Call. Va. 250.

⁶⁹ 1 Washburn, Real Prop. 370; Coke, Litt. 55, a; Pullock v. Kittrell, 2 Tayl. No. C. 153.

⁷⁰ Sullivan v. Enders, 3 Dan. Ky. 66.

⁷¹ Dame v. Dame, 38 N. H. 429. And see 1799, note 48.

1810. *An estate at will is created* either by an express agreement or by implication from the acts of the parties.

A letting for so many years as the lessor and lessee could agree was holden to be a lease at will, because of the uncertainty of the term;⁷² and where a lease for years was made containing a proviso "that the lessee might enter at his will," the tenant had but an estate at will.⁷³ When from the language of the parties it is evident that they did not intend to create a tenancy for a longer period, or for any definite time, the tenant holds at will only; as, where a farmer employs a laborer for a year at a stipulated price per month, and agrees to provide him a house at two dollars per month, payable monthly, the laborer is a tenant at will, and when he ceases to labor his tenancy is determined.⁷⁴

A tenancy at will may be created by implication from the acts of the parties; a few examples will explain this. A person in possession of land, under a contract with the owner for the purchase, is a tenant at will;⁷⁵ and a grantor continuing in possession of the granted premises after the conveyance is tenant at the will of the grantee.⁷⁶

1811. Every estate at will is at the will of both parties, landlord and tenant, and each may dissolve the connection between them at his own pleasure, but in so doing the one is not allowed to do an injury to the other.⁷⁷ The landlord, it is true, may determine the estate at his own pleasure, but he cannot stand by, see the tenant sow the land, and, before the crops are gathered, put an end to the tenancy and take them himself; the tenant is entitled to the emblements upon the ground that a tenant for life is entitled to them by the uncertainty of his tenure. For the purpose of enabling him to reap the full benefit of his labor, the law allows him free ingress, egress, and regress to cut and carry away the profits.⁷⁸ But when the tenancy has been determined by the will of the tenant himself, he will not of course be entitled to enter to carry away the emblements, and they will belong to the landlord.⁷⁹

In Pennsylvania, it has been held that after a lease has expired by its own limitation the lessee becomes a tenant at will, and the landlord may enter upon and dispossess him without notice to quit.⁸⁰ But it must not be literally understood, perhaps, that he is not entitled to notice; all that is meant is that he is not entitled to such a notice as a tenant for years, but he is allowed a reasonable time to remove his effects and family before he becomes a trespasser.⁸¹

The tenant at will is bound to pay the rent during the time he occupies the premises when he determines the estate by his own act; but when the tenant is not bound to pay the rent and the landlord determines it before the time it becomes due, he cannot apportion it.⁸²

1812. Though doubts were formerly entertained as to what acts amounted to a *determination of an estate at will*, it is now settled that the following acts will amount to such a determination:

⁷² Brooke, *Abr. Leases*, 13; 6 Coke, 35.

⁷³ *Turner v. Hodges*, *Hetl.* 128.

⁷⁴ *McGee v. Gibson*, 1 B. Monr. Ky. 105.

⁷⁵ *Proprietors v. McFarland*, 12 Mass. 325; *Love v. Edmonston*, 1 Ired. No. C. 152; *Jones v. Jones*, 2 Rich. So. C. 542.

⁷⁶ *Currier v. Earl*, 13 Me. 216.

⁷⁷ *Cheever v. Pearson*, 16 Pick. Mass. 272; *Doe v. Richards*, 4 Ind. 374.

⁷⁸ *Sherburne v. Jones*, 20 Me. 70.

⁷⁹ Coke, *Litt.* 55.

⁸⁰ *Overdeen v. Lewis*, 1 Watts & S. Penn. 90. See *Hamit v. Lawrence*, 2 A. K. Marsh. Ky. 366; *Bedford v. McElherron*, 2 Serg. & R. Penn. 49.

⁸¹ *Rising v. Stannard*, 17 Mass. 282; *Ellis v. Paige*, 1 Pick. Mass. 43; *Keay v. Goodwin*, 16 Mass. 1.

⁸² See *Leighton v. Theed*, 1 Ld. Raym. 707; 2 Salk. 413.

An express declaration by the lessor that the lessee shall no longer hold as tenant, made either upon the land or notified to the lessee.⁸³

The exertion of any act of ownership by the lessor; as, entering upon the premises and cutting timber, or taking a distress for rent and impounding it on the land.⁸⁴

Making a feoffment or lease for years of the land.⁸⁵

Any act of desertion by the lessee; as, assigning his estate to another, or committing waste, which is an act inconsistent with such tenure.⁸⁶

The death of the lessor or lessee.⁸⁷

A disclaimer by the lessee that he holds of the lessor.⁸⁸

1813. *An estate at sufferance* is where one comes into possession of land by lawful title, and keeps it afterward without any title at all.⁸⁹ This is the most inferior of all estates.

A material distinction has been made between the cases of a person coming to an estate by an act of the owner, and afterward holding over, and by an act of law, and then holding over. In the first case he is regarded as a tenant at sufferance, and in the other as an abator, intruder, or trespasser.⁹⁰

Much difference exists between a tenant at will and a tenant at sufferance; the former is always in by right; the latter enters by a lawful lease, but holds by wrong. A tenant at will has some right, and is capable of receiving a release, there being a privity between him and the lessor; but there is no such privity between a tenant at sufferance and the owner of the land.⁹¹

The tenancy at sufferance is destroyed whenever the true owner makes an entry on the land and ousts the tenant; the rights of the owner are changed by this act, for, although before entry he cannot maintain trespass, immediately afterward he can support that action against his former tenant at sufferance, for continuing on the premises.⁹²

⁸³ Coke, Litt. 55; 1 Ventr. 348; Ellis v. Paige, 1 Pick. Mass. 43; Den v. Howell, 7 Ired. No. C. 496; Davis v. Thompson, 13 Me. 209; Cook v. Cook, 28 Ala. N. S. 660.

⁸⁴ Curl v. Lowell, 19 Pick. Mass. 25; Moore v. Boyd, 24 Me. 242; Holly v. Brown, 14 Conn. 255; Turner v. Doe, 9 Mees. & W. Exch. 643.

⁸⁵ Risings v. Stannard, 17 Mass. 282; Jackson v. Aldrich, 13 Johns. N. Y. 66; Alton v. Pickering, 9 N. H. 494; Howard v. Merriam, 5 Cush. Mass. 563; Ball v. Cullimore, 2 Crompt. M. & R. Exch. 120.

⁸⁶ Cooper v. Adams, 6 Cush. Mass. 87; Den v. Howell, 7 Ired. No. C. 496; Phillips v. Covert, 7 Johns. N. Y. 1.

⁸⁷ 2 Sharswood, Blackst. Comm. 146; Crabb, Real Prop. § 1549; Rising v. Stannard, 17 Mass. 282; Ellis v. Paige, 1 Pick. Mass. 43; Cody v. Quarterman, 12 Ga. 386; Robie v. Smith, 21 Me. 114; Manchester v. Doddridge, 3 Ind. 360.

⁸⁸ Willison v. Watkins, 3 Pet. 49; Woodward v. Brown, 13 id. 1; Fusselman v. Worthington, 14 Ill. 135; Duke v. Harper, 6 Yerg. Tenn. 280; Harrison v. Middleton, 11 Gratt. Va. 527; Currier v. Earl, 13 Me. 216.

⁸⁹ Doe v. Hull, 2 Dowl. & R. 38; Russell v. Fabyan, 34 N. H. 318; Jackson v. Parkhurst, 5 Johns. N. Y. 128; Kinsley v. Ames, 2 Metc. Mass. 29; Evans v. Reed, 5 Gray, Mass. 308.

⁹⁰ Coke, Litt. 57, b; Jackson v. McLeod, 12 Johns. N. Y. 182.

⁹¹ Layman v. Throp, 11 Ired. No. C. 352; Flood v. Flood, 1 All. Mass. 217.

⁹² Rising v. Stannard, 17 Mass. 282; Russell v. Fabyan, 34 N. H. 218; Pearce v. Ferris, 10 N. Y. 280.

CHAPTER XXI.

ESTATES UPON CONDITION.

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- 1825. The equity of redemption.
- 1826. Rights and obligations of the mortgagee.

1814. Having considered the nature of estates of freehold of inheritance and not of inheritance, and of estates less than freehold, it remains now to inquire into estates upon condition.

An *estate upon condition* is one which has a qualification annexed to it, by which, upon the happening or not happening of a particular event, it may be created, or enlarged, or destroyed.¹

There is a marked difference between a condition and limitation, which should be remembered. A condition is a provision respecting a future and uncertain event, on the existence or non-existence of which is made to depend either the accomplishment, the modification, or the rescission of a contract or testamentary disposition. In such case the estate or thing is granted or given absolutely, without limitation, but the title to it is subject to be divested upon the happening or not happening of an uncertain event. For example, a man may give an estate to his wife, provided she shall continue to reside on it; upon her ceasing to reside upon it, his heirs, or, as is held in some states, his devisees, may enter and hold the estate for the breach, though until such entry and determination the estate still remains in the grantee.²

When, on the contrary, the thing or estate is granted or given until an event shall have arrived, and not generally with a liability to be defeated by the happening of the event, the estate is said to be given or granted subject to a limitation; as, if the estate is given while or as long as a woman shall remain a widow, or until she shall marry, the estate being given to her only during the time of her widowhood and no longer, it determines by her marriage, and all her right to it is gone.³

¹ Coke, Litt. 201.

² *Proprietus v. Grant*, 3 Gray, Mass. 142; *Stearns v. Godfrey*, 16 Me. 158; *Chalker v. Chalker*, 1 Conn. 87; *Canal Company v. Railroad Company*, 4 Gill & J. Md. 121; *Phelps v. Chesson*, 12 Ired. No. C. 194; *Tallman v. Snow*, 35 Me. 342. After entry the estate is in the grantor as completely as though no grant had been made. *Sperry v. Sperry*, 8 N. H. 477.

³ Bacon, Abr. *Conditions*, H; 2 Sharswood, Blackst. Comm. 155; Coke, Litt. 236, b; 10 Viner, Abr. 218.

There is but little difference between a condition and a covenant in some instances, and sometimes a clause will be holden to be both a condition and a covenant.⁴

1815. *Conditions may be annexed to estates in fee for life or for years.* The following examples will make this manifest: If A grant you an estate to yourself and to your heirs so long as you reside in the city of Philadelphia, this is a conditional fee; it is a fee because the estate may continue for ever, but since its continuance depends upon your continuing to reside in Philadelphia, it is called a qualified, base, or determinable fee. If, however, the estate cannot last for ever, as if it has been granted while you continue in a certain occupation, it is only a conditional estate for life; but inasmuch as it may continue during the whole term of your existence, it is an estate for life. If, instead of conveying to you a grant, A leased to you an estate for years on condition that you should not plough it, this would have been a conditional estate for years.

1816. In general, it may be said that only *the grantor and his heirs may take advantage of a breach of condition.*⁵ It is a right which cannot be assigned or aliened. In Pennsylvania, however, the right would pass under a sheriff's sale, and the assignee might avail himself of a breach;⁶ and in New Jersey by statute and in Massachusetts in certain cases the devisee of the grantor may enter.⁷ To avail of the breach there must be an entry with that intention.⁸ The grantor parts with his seisin when he conveys the estate on condition, and can regain it only by entry.⁹ The party otherwise entitled to enter may by his acts waive his right.¹⁰ If he once dispense with a condition that destroys the estate in whole or in part, the condition is at an end, for it cannot be apportioned.¹¹

1817. *Conditions are express or implied.* Express conditions, from being contained in a deed or instrument affecting the title to the estate, are often called conditions in deed. Implied conditions arise by implication of law either from being always understood to be annexed to certain estates, or to estates under certain circumstances, and are hence often designated as conditions in law. There are but few implied conditions which operate on an estate which is granted without express condition.

Considered with reference to the time of vesting of the estate, *conditions are either precedent or subsequent.* The distinction is quite important.

Conditions precedent are such as must happen before the estate dependent can arise or be enlarged; conditions subsequent are those upon the happening of which the estate may be defeated.¹² It is often difficult to determine whether a condition is precedent or subsequent. The question is to be decided by the intention of the parties as gathered from the instrument and existing facts.¹³ If

⁴ Platt, Cov. 71.

⁵ Gray v. Blanchard, 8 Pick. Mass. 284; Hooper v. Cummings, 45 Me. 359; Throp v. Johnson, 3 Ind. 343; Van Rensselaer v. Ball, 19 N. Y. 103; Norris v. Milner, 20 Ga. 563; Smith v. Brauman, 13 Cal. 107.

⁶ McKissick v. Pickle, 16 Penn. St. 140.

⁷ Cornelius v. Ivins, 2 Dutch. N. J. 386; Clapp v. Stoughton, 10 Pick. Mass. 463; Austin v. Cambridgeport, 21 id. 215.

⁸ Bowen v. Bowen, 18 Conn. 535; Hamilton v. Elliott, 5 Serg. & R. Penn. 375.

⁹ Sperry v. Sperry, 8 N. H. 477; Phelps v. Chesson, 12 Ired. No. C. 194; Tallman v. Snow, 35 Me. 342.

¹⁰ Chalker v. Chalker, 1 Conn. 79; Coon v. Breckett, 2 N. H. 163; Ludlow v. New York R. 12 Barb. N. Y. 440.

¹¹ Sharon Co. v. Erie, 41 Penn. St. 341; Farley v. Farley, 14 Ind. 331.

¹² Vanhorne's lessee v. Dorrance, 3 Dall. Penn. 317.

¹³ Underhill v. Saratoga R. 20 Barb. N. Y. 455; Rogan v. Walker, 1 Wisc. 527; Wheeler v. Walker, 2 Conn. 196; Hayden v. Stoughton, 5 Pick. Mass. 528. And see Emerson v. Simpson, 43 N. H. 475; McWilliams v. Nisly, 2 Serg. & R. Penn. 513; Gadberry v. Sheppard, 27 Miss. 203; Austin v. Cambridgeport, 21 Pick. Mass. 215.

the act to be performed can be as well performed after as before the vesting of the estate, the condition will generally be held to be subsequent.¹⁴ If the condition is precedent and is unlawful or impossible the estate never can vest.¹⁵ But if a condition subsequent is unlawful or impossible at the creation of the estate, or becomes so by act of God or by the act of the feoffor, the estate vests absolutely and unconditionally.¹⁶

Conditions are also possible and impossible, lawful and unlawful, copulative and disjunctive, consistent and repugnant, positive and negative, and resolatory and suspensive.

Among estates upon condition may be included, estates by statute merchant, estates by statute staple, estates by elegit, and estates by mortgage.

1818. *Estates by statute merchant, statute staple, and by elegit* have been placed by Blackstone under the head of estates upon condition.¹⁷ They are unknown in practice in the United States. Their object, in England, was to make lands available for the payment of debts, contrary to the general policy of the feudal law. The creditor was by them authorized to take possession of the land, and, out of the profit, to pay himself. In the United States, lands are generally liable for the payment of debts.

1819. At common law a *mortgage estate* was strictly an estate in the mortgagee upon condition that upon the payment of a debt or the performance of some act by the mortgagor the estate should be defeated. It differed from other estates upon condition mainly in the fact that in the case of a mortgage the grantor was the party who was to do the act which caused the forfeiture of the grantee's estate. If the act was performed as required by the condition, the mortgagee's estate was at an end; if not, the estate became his unconditionally.

In equity, however, it was considered that the substance of the transaction was a loan of money to the mortgagor, while the conveyance of the legal title was a mere auxiliary matter. It is an old and well-established doctrine that equity will grant a relief from forfeiture, for non-performance of conditions subsequent at the exact time required, where the damages are capable of exact estimation. So that in case of a mortgage the non-payment of the debt at the time agreed upon was not allowed to work a forfeiture, but the mortgagor might by bill in equity redeem the estate conveyed by payment of the debt and interest, which equity considered as the compensatory damages for the delay.

In equity, the substance of the transaction being the loan, and the conveyance of the estate merely a security for its repayment, courts of equity came to regard the estate as being essentially in the mortgagor, and the more so as in consequence of the doctrine of relieving from forfeiture in equity, the only certain way of enforcing the mortgage was by a proceeding in equity to obtain a foreclosure.

The different states, either by statute or by decisions, have adopted more or less of the equitable doctrines in regard to mortgages, but in such varying degrees that it would be impossible to indicate within the limits allowed to the subject under the plan of this work the extent to which the equitable doctrines have prevailed over the old common law doctrine of mortgages.

¹⁴ *Finlay v. King*, 3 Pet. 374; *Taylor v. Mason*, 9 Wheat. 325; *Webster v. Cooper*, 14 How. 500; *Nicholl v. New York*, 11 N. Y. 121; *Hayden v. Stoughton*, 5 Pick. Mass. 528; *Jones v. Walker*, 13 B. Monr. Ky. 163; *Barksdale v. Elam*, 30 Miss. 694; *Maurick v. Andrews*, 25 Me. 525; *Horsey v. Horsey*, 4 Harr. Del. 517.

¹⁵ *Taylor v. Mason*, 9 Wheat. 325; *Martin v. Ballou*, 13 Barb. N. Y. 119; *Mizell v. Burnett*, 4 Jones, No. C. 249; *Baltimore Railroad v. Polly*, 14 Gratt. Va. 447.

¹⁶ *Taylor v. Sutton*, 15 Ga. 103; *Badlam v. Tucker*, 1 Pick. Mass. 284; *Blackstone Bank v. Davis*, 21 id. 42; *Gadberry v. Sheppard*, 27 Miss. 203.

¹⁷ 2 Sharswood, Blackst. Comm. 160.

Professor Washburn, in his valuable work on the law of real property, has given three classes under which the doctrines held in the different states may be arranged. In the first the mortgage deed is held to create a seisin of and an estate in the premises in the mortgagee, with the incidents belonging thereto at common law, such as a right of possession, to be enforced, if need be, by ejectment, or other suit at law. Another incident to this class of mortgage interests is the right which the mortgagee has upon failure of the mortgagor to perform the conditions to become himself, through some process of foreclosure, the absolute owner of the estate. In this class are included Connecticut, Indiana, Maine, Massachusetts, Minnesota, Mississippi, Missouri, New Hampshire, North Carolina, Rhode Island, and Vermont.

In the second class, while it is assumed that the mortgage deed creates an interest in the mortgaged premises answering to an estate in the mortgagee, his rights and remedies in and to the same are limited to such as the rules of equity prescribe, and may not be enforced by a suit at law. In this class are Illinois, Iowa, Ohio, Kentucky, Pennsylvania, Texas, and Wisconsin.

In the third, the interest of the mortgagee is not deemed an estate but a mere lien to be enforced as such through the instrumentality of a court of equity, by causing the premises to be sold as a means of payment of the debt secured. In this class are California, Georgia, and New York.

1820. *The form of a mortgage* does not differ in any respect from that of a common deed of conveyance in fee, except the condition of defeasance. It must be in writing when it is intended to convey the legal title of land;¹⁸ it is either in one deed which contains the whole contract, and which is the usual form, or it is composed of two separate instruments, the one containing an absolute conveyance, and the other a defeasance;¹⁹ it is not requisite that the two instruments should bear the same date, as they take effect from their delivery; it is sufficient if both are delivered at the same time.²⁰ They must, however, be of the same nature; a defeasance not under seal will not, at law, be sufficient,²¹ but the rule is different in equity.²² It may be observed as a general rule that whatever clauses or covenants there are in a conveyance, though they seem to import an absolute disposition or conditional purchase, yet if, upon the whole, it seems to have been the intention of the parties that such conveyance should be a mortgage only, or pass an estate redeemable, a court of equity will construe it to be a mortgage.²³

1821. Formerly there were in England two modes of pledging land for the security and repayment of money borrowed, for the fulfilment of an obligation or a covenant.

¹⁸ *Bowers v. Oyster*, 1 Penn. 240; *Shitz v. Diffenbach*, 3 Penn. St. 233.

¹⁹ *Brown v. Dean*, 3 Wend. N. Y. 208; *Colwell v. Woods*, 3 Watts, Penn. 188; *Peterson v. Clark*, 15 Johns. N. Y. 205; *Stoevers v. Stoevers*, 9 Serg. & R. Penn. 434; *Johnston v. Gray*, 16 Serg. & R. Penn. 361; *Wharf v. Howell*, 5 Binn. Penn. 499; *Van Wagner v. Van Wagner*, 3 Halst. Ch. N. J. 27; *Cross v. Hepner*, 7 Ind. 359; *Marshall v. Stewart*, 17 Ohio, 356; *Woodward v. Pickett*, 8 Gray, Mass. 617; *Tomlinson v. Monmouth Ins. Co.*, 47 Me. 232.

²⁰ *Harrison v. Phillips' Academy*, 12 Mass. 456; *Newhall v. Burt*, 7 Pick. Mass. 157; *Bryan v. Cowart*, 21 Ala. N. S. 92; *Sweetland v. Sweetland*, 3 Mich. 482; *Bennock v. Whipple*, 12 Me. 340; *Reitenbaugh v. Ludwick*, 31 Penn. St. 131; *Holmes v. Grant*, 8 Paige, Ch. N. Y. 243; *Scott v. Henry*, 13 Ark. 112; *Whitney v. French*, 25 Vt. 663; *Baldwin v. Jenkins*, 23 Miss. 206.

²¹ *Kelleran v. Brown*, 4 Mass. 443; *Eaton v. Green*, 22 Pick. Mass. 526; *Flagg v. Mann*, 14 *id.* 467; *Kelly v. Thompson*, 7 Watts, Penn. 401; *Richardson v. Woodbury*, 43 Me. 206; *Lund v. Lund*, 1 N. H. 39; *Erwin v. Shuey*, 8 Ohio St. 510.

²² *Flagg v. Mann*, 14 Pick. Mass. 467; *Chase v. Peck*, 21 N. Y. 581.

²³ As to the manner of proof that a conveyance absolute on its face is really a mortgage, see beyond, 3138.

The first was called *vivum vadium*. It was a conveyance of land by a debtor to his creditor to hold until the profits and rents should amount to the sum borrowed; in this case the pledge was said to be living, for on the discharge of the debt it survived and returned to the borrower.

This is very similar to the antichresis of the Roman law, which was a species of mortgage by which the creditor acquired a right of reaping the fruits or other revenues of the immovables given him as a hypothec, on condition of deducting, annually, their proceeds from the interest which might become due to him, and afterward from the principal of his debt.²⁴ Such is now the law of Louisiana.²⁵

The second mode of pledging lands was by mortgage *mortuum vadium*, which dead pledge has been said to be so called because the estate of the pledgor was dead and gone upon the failure to perform the condition.²⁶ By this form of pledge a conveyance of the estate was made to the grantee or mortgagee, but upon condition that if the mortgagor should discharge the debt according to the terms of the condition, the estate of the mortgagee should be defeated. If the condition was not exactly complied with, the estate was absolutely gone.²⁷ From this form of pledge the modern mortgage has been derived.²⁸ In equity, it was considered not only that the performance of the condition at the exact time required was not essential, and hence that relief would be furnished upon equitable terms where the mortgagor desired to perform it after the time had passed, but also that the whole substance of the transaction was a mere pledge, and that, therefore, except so far as might be necessary to support the rights of the mortgagee, the ownership of the estate is substantially in the mortgagor, subject to the claim of the mortgagee, which is rather in the nature of a lien than an estate. By judicial decision and by statutes the original rules of the common law have been modified in all jurisdictions where that law prevails in varying degrees, and been made to approximate in a greater or less degree to the equitable doctrines. In this point of view it has sometimes been maintained that this kind of security was derived from the Roman hypothec, though they differ essentially from each other. The hypothec resembled a lien more than a mortgage; the title to the land was not conveyed to the creditor with a defeasance, but it was simply bound for the debt; and the hypothec was not confined to the contract of the debtor, but might arise in two ways: first, by the express agreement of the debtor, which was the conventional hypothec; secondly, the implied or legal hypothec, which was created by the disposition of the law. This was nothing but a lien or privilege which the creditor enjoyed of being first paid out of the land subjected to this incumbrance. For example, the landlord had hypothec on the goods of his tenant or others while on the premises let; a mason had the same on the house he built; a pupil or a minor on the land of his tutor or curator, who had received his money.²⁹

1822. In order to prevent imposition and to insure good faith, the law in perhaps all the states of the Union requires that mortgages shall be recorded or registered in certain offices, so that they may be known to all the world; and of this registry every one who has an interest in the property mortgaged is bound to take notice.³⁰ In general, the first recorded mortgage has a preference over

²⁴ Dig. 13, 7, 7; Code 4, 24, 1; Code, 8, 28, 1.

²⁵ La. Civ. Code, art. 3143.

²⁶ 2 Sharswood, Blackst. Comm. 157.

²⁷ Coke, Litt. 205, a; 2 Sharswood, Blackst. Comm. 157.

²⁸ Schuylkill Co. v. Thoburn, 7 Serg. & R. Penn. 419; Assay v. Hoover, 5 Penn. St. 21; Briggs v. Fish, 2 N. Chipm. Vt. 100.

²⁹ Clef des Loix Rom, *Hypothèque*.

³⁰ Evans v. Jones, 1 Yeates, Penn. 172; Leving v. Will, 1 Dall. 430; Johnson v. Stagg, 2 Johns. N. Y. 510; Doe v. Bank of Cleveland, 3 McLean, C. C. 140. But it is notice only

all others, they taking their ranks in the order of priority of recording. And when the deed of defeasance is in a separate instrument, it should also be recorded; otherwise, the mortgage will appear as an absolute deed, and will in general have that effect except between the parties and their heirs.³¹ But it has been held that both the instruments must be recorded in order to give them validity as a mortgage against the land.³²

As between the parties,³³ or against subsequent purchasers with actual notice,³⁴ an unrecorded mortgage is good.

By statutory provision in some of the states, the mortgage must be recorded within a certain time after it is given in order to give it validity against the creditors of the mortgagor.³⁵ But although not recorded within the prescribed time, it is good against the mortgagor, for it cannot be pretended he had no notice.³⁶

1823. *At common law* the estate of the mortgagor in the mortgaged premises was simply an interest reversionary in its character, like the estate of any other grantor of an estate upon condition. It was not even an assignable estate;³⁷ and if the mortgagor remains in possession technically considered, he has a mere tenancy, and the mortgagee may enter at his pleasure at any time, even before default, in the same manner as he might upon any other tenant. In practice, however, an agreement is usually inserted in the mortgage that the mortgagee shall have no such right of entry, or that the mortgagor shall retain possession until some default in the performance of the conditions of the mortgage, either as in the payment of interest or of the principal; and in some states this result is secured by statute.³⁸

The mortgagor has no right to commit waste, and he may be prevented by injunction,³⁹ and in some states by a writ of estrepement, which lay at common law to prevent a party in possession from committing waste on an estate, the title of which was disputed after judgment obtained in a real action, and before possession was delivered by the sheriff.⁴⁰

of such matters as appear of record. *Frost v. Beckman*, 18 Johns. N. Y. 544; *Barret v. Shaubhut*, 5 Minn. 323. And irregular registration is no notice. *White v. Denman*, 1 Ohio St. 110; *Blood v. Blood*, 23 Pick. Mass. 80; *Work v. Harper*, 24 Miss. 517; *Rushin v. Shields*, 11 Ga. 636; *Levitt v. Moulton*, 17 Me. 418. And see *McLarren v. Thompson*, 40 Me. 284; *Curtis v. Lyman*, 24 Vt. 338.

³¹ *Day v. Dunham*, 2 Johns. Ch. N. Y. 182.

³² *Jacques v. Weeks*, 7 Watts, Penn. 261; *Brown v. Dean*, 3 Wend. N. Y. 208; *Friedly v. Hamilton*, 17 Serg. & R. Penn. 70. But see *Skinner v. Cox*, 4 Dev. No. C. 59.

³³ *Howard Ass. v. McIntyre*, 3 All. Mass. 571; *Fosdick v. Barr*, 3 Ohio St. 471; *Andrews v. Burns*, 11 Ala. 691; *Salmon v. Claggett*, 3 Bland. Ch. Md. 126.

³⁴ *Sparks v. State Bank*, 7 Blackf. Ind. 469; *Woodworth v. Guzman*, 1 Cal. 203; *General Ins. Co. v. United States Ins. Co.* 10 Md. 517; *Harris v. Norton*, 16 Barb. N. Y. 264; *Dearing v. Watkins*, 16 Ala. 20; *Copeland v. Copeland*, 28 Me. 525; *Solms v. McCulloch*, 5 Penn. St. 473.

³⁵ *Stephens v. Barnett*, 7 Dan. Ky. 257; *Semple v. Burd*, 7 Serg. & R. Penn. 286. The statutory requirements as to recording are generally the same as in the case of deeds, though there are special provisions in some states. See *Jacoway v. Gault*, 20 Ark. 190; *Davidson v. Cowan*, 1 Dev. Eq. No. C. 470; *Spader v. Lawler*, 17 Ohio, 379; *Clason v. Shepherd*, 6 Wisc. 369.

³⁶ *Sevinz v. Will*, 1 Dall. 430; *Den v. Watkins*, 1 Halst. N. J. 445.

³⁷ *Collet v. DeGolls*, Cas. temp. Talb. 66; *Hasket v. Strong*, Strange, 689.

³⁸ *Syracuse City Bank v. Tallman*, 31 Barb. N. Y. 201; *Flagg v. Flagg*, 11 Pick. Mass. 475; *Brown v. Cram*, 1 N. H. 169. That the agreement need not be in the deed, see *Clay v. Wren*, 34 Me. 187. And see *Wales v. Mellen*, 1 Gray, Mass. 512; *Lamb v. Foss*, 21 Me. 240; *Rogers v. Grazebrook*, 8 Q. B. 895.

³⁹ *Cooper v. Davis*, 15 Conn. 556; *Brady v. Waldron*, 2 Johns. Ch. N. Y. 148; *Scott v. Wharton*, 2 Hen. & M. Va. 25; *Brick v. Getsinger*, 1 Halst. Ch. N. J. 391; *Gray v. Baldwin*, 8 Blackf. Ind. 164; *Parsons v. Hughes*, 12 Md. 1; *Mooney v. Brinkley*, 17 Ark. 340.

⁴⁰ *Purdon*, Dig. Penn. 8th ed. 336. The remedies in the other states are various. In Maine, New Hampshire, and Massachusetts trespass lies. *Frothingham v. McKusick*, 24

The mortgagor in possession is bound to pay the taxes and other incumbrances on the mortgaged premises when he has conveyed with covenant of warranty.⁴¹

The principal obligation of the mortgagor is to pay the debt for which the mortgage was given as a security.

1824. *In equity*, the mortgage is considered as a mere security for the debt and only a chattel interest, and until a decree of foreclosure the mortgagor continues the real owner of the fee, the equity of redemption being considered tantamount to the fee at law. It may, therefore, be devised by will, and it descends as an inheritance; it may be conveyed by deed as an absolute estate of inheritance at law.

1825. *An equity of redemption* is a right which the mortgagor of an estate has of redeeming it after it has been forfeited at law by the non-payment of the money at the time required in the mortgage to be paid, by paying the amount of the debt, interest, and costs.⁴²

An equity of redemption is the mere creature of a court of equity, founded on this principle, that as a mortgage is nothing more than a pledge for securing the repayment of the money to the mortgagee, it is but natural justice to consider the ownership of the land as being still in the mortgagor, subject only to the legal title of the mortgagee, so far as such legal title is necessary to his security.

The right of redemption exists not only in the mortgagor himself, but in his heirs and personal representatives, and his assignee, and in every other person who has an interest in or a legal or equitable title to the lands; and therefore, a tenant in dower, a jointress, a tenant by the curtesy, a remainder-man and a reversioner, a judgment creditor, and every other incumbrancer, unless he be an incumbrancer *pendente lite*, may redeem.⁴³ He who redeems, when he pays the whole debt stands in the place of the mortgagee.⁴⁴ And this right of the mortgagor to redeem is of so high a nature that equity will regard as a nullity any agreement between the parties that an estate conveyed by way of mortgage should not be redeemable, or should only be redeemable at a particular time or by a particular person or class of persons.⁴⁵

1826. We have already seen that the mortgagee is entitled to the possession of the estate, although he cannot be considered as the owner.

When he takes possession of the mortgaged premises before foreclosure, he is accountable for the actual receipts of the rents and profits, and nothing more,

Me. 403; *Sanders v. Reed*, 12 N. H. 558; *Page v. Robinson*, 10 Cush. Mass. 99. In Vermont, case in the nature of waste, *Langdon v. Paul*, 22 Vt. 205. In New York, case, *Van Pelt v. McGraw*, 4 N. Y. 110. In Rhode Island and Vermont, the mortgagee may have replevin for timber cut and carried away. *Waterman v. Matteson*, 4 R. I. 539; *Langdon v. Paul*, 22 Vt. 205.

⁴¹ In North Carolina, with perhaps more propriety, the right of the mortgagor before forfeiture is called a right of redemption, and afterward an equity of redemption. 1 No. C. Rev. St. 266.

⁴² See as to equity of redemption, Cruise, Dig. t. 15, c. 3; Powell, Mortg. ch. 10 and 11; 2 Supplement to Ves. Ch. 338.

⁴³ See *Grant v. Duane*, 9 Johns. N. Y. 591. See *Porter v. Reed*, 19 Me. 363. See *Kil-lengher v. Reidenhauer*, 6 Serg. & R. Penn. 531.

⁴⁴ *Palk v. Clinton*, 12 Ves. Ch. 59; 2 Root, Conn. 333. When one of two joint owners of land pays off a mortgage on the land and takes an assignment of it, the mortgage is not extinguished, but the assignee, in Pennsylvania, may sue it out and have a judgment *de terria* as against a subsequent judgment creditor of his co-tenant. *Duncan v. Drury*, 9 Penn. St. 332.

⁴⁵ *Murphy v. Calley*, 1 All. Mass. 107; *Gillis v. Martin*, 2 Dev. Eq. No. C. 470; *Clark v. Henry*, 2 Conn. 327; *Jaques v. Weeks*, 7 Watts, Penn. 268; *Miami Co. v. U. S. Bank*, 1 Wright, Ohio, 249; *Lund v. Lund*, 1 N. H. 39.

unless they were lost or reduced by his neglect, or wilful default, or gross negligence.⁴⁶ Out of these rents and profits he is allowed to pay taxes, make necessary repairs, and defend the title to the estate.⁴⁷

The mortgagee is entitled also to the payment of the money due to him and secured by the mortgage, and, if not paid when due, to a foreclosure. By foreclosure is meant a proceeding by which the mortgagee's equity of redemption is barred and foreclosed for ever. This is done by filing a bill in equity, calling upon the mortgagor to redeem his estate presently, or, in default thereof, to be for ever closed and barred from any right of redemption.

In some states, however, the mortgagee obtains a decree for the sale of the land, under the direction of an officer of the court, in which case the proceeds are applied to the discharge of incumbrances, according to their priority.⁴⁸

When it is the practice to foreclose without a sale, its severity is mitigated by enlarging the time of redemption from six months to six months or shorter periods, according to the equity arising from the circumstances.

In some of the states a method of foreclosure is provided by entry in the presence of witnesses and recording a certificate of the fact. A bill in equity may be brought for redemption during the period limited by the statute; and if not so brought, all interest in the estate is gone. This form of proceeding, it will be seen, is closely analogous to entry for a breach of condition with an interference by equity when its aid is invoked within a suitable time.

⁴⁶ See *Portland Bank v. Fox*, 19 Me. 99.

⁴⁷ See *Russell v. Blake*, 2 Pick. Mass. 505.

⁴⁸ This practice has prevailed in Indiana, Kentucky, Maryland, South Carolina, Tennessee, and Virginia. In Pennsylvania, a *scire facias* is issued on the recorded mortgage, a judgment is obtained, and the land is sold under it.

CHAPTER XXII.

TIME OF ENJOYMENT OF ESTATES.

- 1828. Estates in possession.
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- 1846-1853. Executory devises.
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 - 1852. Limitations to executory devises.
- 1854-1859. Reversions.
 - 1855. Reversion, how created.
 - 1856. In what a reversion may be had.
 - 1857. Incidents of a reversion.
 - 1858. Rights of the reversioner.

1827. We have considered estates as to their duration and the quantity of interest which may be had in them. In this chapter we will take a view of the time when the right of the parties to them begins: Estates are in possession, and not in possession; the latter are in remainder or reversion. They will be considered in the following order: estates in possession, estates in remainder, executory devises, and estates in reversion.

1828. *An estate in possession* is one by which a present interest passes to and is vested in the tenant, not depending upon any future circumstances or contingency. It is sometimes called an executed estate, in contradistinction to one which is executory. An executed estate vests in the grantee a present and immediate right of present and future enjoyment.¹

1829. *A remainder*, or an estate in remainder, may be defined to be one limited to take effect and be enjoyed after another estate, created at the same time, has been determined.² For example, Primus grants to Secundus an estate for life, and, after his death, to Tertius and his heirs. The estate granted to Se-

¹ Preston, Estates, 62.

² See Fearne, Remainders; Cornish, Remainders; Bacon, Abr.; Comyn Dig.; Cruise, Dig. t. 16; 2 Sharswood, Blackst. Comm. 163, 164.

cundus is called the particular estate, it being only a small part, *particula*, of the inheritance; the residue, or the estate granted to Tertius, is called a remainder. It is evident there can be no remainder without a particular estate, because remainder is a relative expression, and imports that some part has been previously disposed of.

Remainders differ from reversions in several matters: a remainder is always created by the act of the parties, a reversion arises from operation of law; the former is never limited to the grantor, while the latter is always reserved to him and his heirs; a remainder is a part of the estate granted to another, a reversion is the reservation of the whole estate to the grantor after the particular estate shall have expired.³

This subject will be divided into three heads: of the creation of a remainder, of the different kinds of remainders, how contingent remainders may be defeated.

1830. To make a good remainder there are three requisites, namely, "an estate precedent, made at the same time that the remainder commences; that the particular estate continue when the remainder vests; and that the remainder be out of the donor at the time of livery."⁴

Remainders are created by deed, which alone will be here considered; and by will, known by the name of executory devises.

1831. A *particular estate* is one which is carved out of a larger, and which precedes a remainder; it is said to support the remainder. For example, where an estate is granted to A for years, remainder to B for life; or an estate for life to A, and remainder to B in tail. This precedent estate is called the *particular estate*. If an estate be made to commence at a future time, without any intervening estate, the gift is void.⁵ When there is a particular estate and a remainder, the two form but one estate, the possession of the particular tenant being the possession of the remainder-man.

But the particular estate must be some certain right in the land which is carved out of the estate in order to create a remainder; and an estate at will, which is uncertain, trifling, and precarious, is not sufficient to support a remainder. The particular estate must be less than a fee, for after a fee there can be no remainder.

There can be no remainder limited after an estate of inheritance, unless it be after an estate tail, though there may be a future use or executory devise.

1832. *The remainder must commence or pass out of the grantor at the time of the creation of the particular estate;*⁶ as, when a grant is made to A for life, with remainder to B in fee; here the remainder passes to B at the same time that A obtains possession of his estate for life.

1833. *The remainder must vest in the grantee during the continuance of the particular estate, or eo instanti* that it determines; as, if there be a lease for life, remainder to the right heirs of B or the first son of B, if B dies or has a son in the lifetime of the lessee, the remainder will be good.

1834. The rules which have been explained have given rise to the distinction between *vested* and *contingent remainders*.

1835. A *vested remainder* is one by which a present interest passes to the party, though to be enjoyed *in futuro*, and by which the estate is invariably fixed to remain to a determinate person after the particular estate has been spent. For example, if a grant of an estate for life be made to Primus, with remainder to Secundus and his heirs in fee; here Secundus acquires a present interest, of which he may dispose at his pleasure, though he cannot enjoy it till

³ *Proprietors v. Grant*, 3 Gray, Mass. 144.

⁴ 2 Sharswood, Blackst. Comm. 166.

⁵ Plowd. 25.

⁶ Litt. § 671.

after the death of Primus. In this case it is apparent that the moment Primus dies, Secundus or his heirs or assigns will be entitled to the remainder, the particular estate being ended by the death of Primus. In other words, the estate is vested; that is, the remainder-man has an immediate and fixed right of present or of future enjoyment.

There may be many successive remainders, and the whole of them may be vested; if, for example, land be limited to Primus for life; remainder to Secundus in tail, remainder to Tertius in fee; Secundus' remainder is vested, because if Primus should die immediately, Secundus would take; and Tertius is also vested, because if Primus should die, and also Secundus, without heirs, Tertius would take.

1836. A *contingent remainder* is one which is limited to take effect on an event or condition which may never happen or be performed, or which may not happen or be performed till after the determination of the preceding particular estate; in which case such remainder can never take effect. The doubt or uncertainty may relate to the person or to an event. Examples of these two cases will make this manifest:

If I grant you an estate for life, remainder to the heirs of your brother in fee, the heirs of your brother, being unknown till after his death, because a living man can have no heirs, *nemo est hæres viventis*, the remainder to his heirs is contingent. If he dies before you, the remainder becomes vested in his heirs; but if he survives you, the remainder does not vest at all, because by your death the particular estate is terminated, and no one answering to the description of heirs to your brother exists to take *eo instanti*, of your death. In this case the remainder is contingent, because it is limited to an uncertain person.

The contingency may be limited upon an uncertain event, If I grant you an estate for life, with a remainder to your brother if he shall survive you, the remainder is contingent.

As soon as the contingency upon which the remainder depends has happened, and this uncertainty has been changed to a certainty, the remainder vests of itself in the person to whom it is limited, without any act to be done by him.⁷ When it becomes vested it may be the subject of a sale, but until then the interest is but a mere possibility.

1837. The principal rules which govern *contingent remainders* are the following:

If the remainders amount to a freehold, they cannot be limited on an estate for years, or any other particular estate less than freehold; because in such case the freehold would not pass out of the grantor at the time when the remainder would be created, and this would make it void.⁸

The event upon which the contingency depends must be lawful; a remainder limited to a bastard to be begotten, or to a man who should commit a particular crime, would be void.⁹

The contingency or event upon which the remainder is to vest must not be such as would defeat the particular estate; as, if a man grant to Primus an estate for life, with remainder over to Secundus immediately on his paying the grantor a certain sum of money, this remainder would be void, because it would defeat the estate for life.¹⁰

The event must be a common possibility, and *potentia propinqua*, as death, or death without issue, or coverture or the like, and not a remote possibility. A

⁷ Carver v. Jackson, 4 Pet. 1.

⁸ 2 Sharswood, Blackst. Comm. 171.

⁹ Croke, Eliz. 509; Plowd. 32; 2 Coke, 51; Fearn, Cont. Rem. 175, 176.

¹⁰ Fearn, Cont. Rem. 177.

remainder to a corporation which is not in being at the time of the limitation is therefore void, although it be erected during the particular estate.¹¹

1838. *Contingent remainders* have been reduced by Mr. Fearne into four classes: 1, where the remainder depends entirely on a contingent determination of the preceding estate itself; 2, where the contingency on which the remainder is to take effect is independent of the determination of the preceding estate; 3, where the condition upon which the remainder is limited is certain in event, but the determination of the particular estate may happen before it; 4, where the person to whom the remainder is limited is not yet ascertained, or not yet in being.¹²

1839. The following is an example of the *first class*, where the remainder depends entirely on a contingent determination of the preceding estate itself, namely: where Primus makes a feoffment to the use of Secundus till Tertius shall return from Rome, and after such return of Tertius, then to remain in fee; here the particular estate is limited to determine on the return of Tertius, and on that determination of it, the remainder is to take effect, but that is an event which may possibly never happen, and therefore the remainder, which depends entirely upon the determination of the preceding estate by it, is dubious and contingent.¹³

1840. An example of the *second class*, where the contingency, on which the remainder is to take effect, is independent of the determination of the preceding estate, is as follows: If a lease be made to A for life, and, if B die before A, remainder to C for life, here the event of B's dying before A does not in the least affect the determination of the particular estate; nevertheless it must precede and give effect to C's remainder; but such an event is dubious, it may or it may not happen, and the remainder depending on it is therefore contingent.¹⁴

1841. The *third class* includes remainders where the condition upon which the remainder is limited is certain in event, but the determination of the particular estate may happen before it. It is a rule, as has already been observed, that a remainder must vest either during the continuance of the preceding estate, or at the very instant of its determination; so that if the event does not so happen, the remainder becomes void. Lord Coke puts the following example: If a lease be made to J S for life, and after the death of J D to remain to another in fee, this remainder is contingent; for though J D must die some time or other, yet if he survive J S, by whose death the particular estate will determine, the remainder will become void.¹⁵

1842. The *fourth class* of contingent remainders is where it is limited to a person not ascertained or not in being at the time when such limitation is made; for example, if a lease be made to one for life, remainder to the heirs of Paul; now there can be no such person as the right heir of Paul till his death, for *nemo est hæres viventis*; and as Paul may not die till after the determination of the particular estate, such remainder is contingent.¹⁶ Again, where an estate is limited to two persons during their joint lives, remainder to the survivor in fee, such remainder is contingent, because it is uncertain which of them will survive.¹⁷

1843. A distinction which operates by way of *exception to the third class* of contingent remainders has been adopted; it is this: When a limitation for a long term of years, as eighty years or upward, determinable on the life of a

¹¹ Fearne, Cont. Rem. 176.

¹² Ibid. 5.

¹³ 3 Coke, 20, a; 10 Coke, 85; Coke, Litt. 378, a; Perk. s. 156.

¹⁴ 3 Coke, 20, a. See Weale v. Lower, Poll. 57.

¹⁵ Coke, Litt. 378, a; 3 Coke, 10, a.

¹⁷ Croke, Car. 102.

¹³ 3 Coke, 20, a.

person then in being, with remainder over on the death of that person, to a person *in esse* (as a limitation to A for eighty years, if B so long live, with remainder over after the death of B to C in fee) it has been held that notwithstanding the remainder over is in this case limited to take effect on the death of B, an event which possibly may not happen till after the expiration of the particular estate for eighty years, yet as the chance against the happening of such an event before the expiration of the preceding term is exceedingly small, such remainder shall be considered as vested; and that the possibility that a life in being may endure for eighty years to come, does not amount to that degree of uncertainty sufficient to constitute a contingent remainder.¹⁸ But if the limitation had been for a term of years so short, say twenty-one years, as to leave a common possibility that the life on which it is determinable may exceed it, the remainder would then be contingent, and there must be a present particular estate of freehold to support it, and prevent the limitation over from being void as a freehold to commence *in futuro*.¹⁹

1844. Several exceptions exist as to the generality of the rule which governs the fourth class of contingent remainders. They are as follows:

The first of these exceptions arises from a rule of law, known as the *rule in Shelley's case*, which has given rise to more commentaries than perhaps any other rule ever adopted by the courts.²⁰ It has been expressed with great precision, though not with much elegance, to be "in an instrument, if a freehold be limited to the ancestor for life, and the inheritance to his heirs, either mediately or immediately, the first taker takes the whole estate; if it be limited to the heirs of his body, he takes a fee in tail; if to his heirs, a fee simple."²¹ Such remainder is immediately executed in the ancestor taking the freehold, and it is not contingent; the possibility that the freehold in the first taker may determine in his lifetime does not keep the subsequent limitation to his heirs from attaching to him; for when the ancestor takes an estate of freehold, and in the same conveyance there is an unconditional limitation to his heirs in fee, or in tail, either immediately, without the intervention of any estate of freehold, between his freehold and the subsequent limitation to his heirs, or mediately, with the interposition of some such intervening estate, the subsequent limita-

¹⁸ *Napper v. Sanders*, Hutt. 119. See Poll. 67; *Beverly v. Beverly*, 2 Vern. Ch. 131; *Fearne*, Cont. Rem. 11.

¹⁹ Hutt. 118; Pollexf. 67.

²⁰ See Coke, Litt. 376, b, and Mr. Butler's note (1); 1 Preston, Est. c. 3; Cruise, Dig. t. 32, c. 22; 1 Hargr. Law Tracts, article "Observations concerning the rule in Shelley's case, chiefly with a view to the application of that rule to last wills." 4 Kent, Comm. 214, 4th ed.

²¹ Coke, Litt. 376, b; Shelley's case, 1 Coke, 104. The rule in Shelley's case has been adopted pretty generally in those of the United States where the common law is the basis of their jurisprudence. James' claim, 1 Dall. 47; *McFeely v. Moore*, 5 Ohio, 465; *Findlay v. Riddle*, 3 Binn. Penn. 139; *Bishop v. Selleck*, 1 Day, Conn. 299; *Lyles v. Digge*, 6 Harr. & J. Md. 364. In New York, it has been abolished. 4 Kent, Comm. 232. The rule has been abolished as a rule of law in the following states: *Alabama*, Code, 1852, § 1304; *Connecticut*, Comp. Stat. 1854, 630, § 5; *Kentucky*, Rev. Stat. 1852, c. 80, § 10; *Williamson v. Williamson*, 18 B. Monr. Ky. 329; *Maine*, Rev. Stat. 1857, c. 73, § 6; *Massachusetts*, both in deeds and wills, Gen. Stat. c. 89, § 12. An estate for life vests in the first taker, and a remainder in fee simple in the heirs. *Richardson v. Wheatland*, 7 Metc. Mass. 169, 172. *Michigan*, Comp. Laws, 1857, c. 85, § 28; *Minnesota*, Comp. Laws, 1859, c. 31, § 28; *Mississippi*, as to lands, *Powell v. Brandon*, 24 Miss. 343; *Missouri*, Rev. Stat. 1855, c. 32, § 7; *New Hampshire*, as to wills, Comp. Stat. 1853, c. 165, § 5; *Dennett v. Dennett*, 40 N. H. 500; *New Jersey*, Stat. tit. 10, c. 2, § 10. The rule applies to devises as to lands. *Den v. Demarest*, 1 N. J. 525. *New York*, Rev. Stat. 4th ed. p. 2, tit. 2, art. 1, § 28; 4 Kent, Comm. 232; *Ohio*, as to wills, Rev. Stat. 1854, c. 122, § 53; *Rhode Island*, as to wills, Rev. Stat. c. 154, § 2; *Tennessee*, Code, 1858, § 2008; *Virginia*, Code, 1849, c. 116, § 11; *Wisconsin*, Rev. Stat. 1858, c. 83, § 28.

tion vests immediately in the ancestor, and becomes, as the case may be, either an estate of inheritance in possession or a vested remainder.

But in these cases the freehold in the ancestor, and the limitation to his heirs, must be in the same deed or instrument, or they will not consolidate in the ancestor;²² and so they must be in the same right; for if the estate limited to the ancestor be merely an equitable estate, as a trust, and the subsequent limitation to his heirs carries the legal estate, the two estates will not incorporate into an estate of inheritance in the ancestor, as if they had been of one quality, that is, both legal or both equitable estates; and the limitation to the heirs will operate as a contingent remainder.

In these cases the context may be resorted to, to determine the significance attached to the words used. Heirs generally is a word of limitation,²³ but may be construed a word of purchase if the intention be clear;²⁴ child or children is a word of purchase unless clearly intended otherwise.²⁵ Issue is always a word of purchase in a deed.²⁶

The second exception to the generality of the rule contained in the fourth class is that an ultimate limitation to the right heirs of the grantor will continue in him as his old reversion, and not as a remainder, though the freehold be expressly limited from him.²⁷

A third exception to the fourth class of contingent remainders arises from the respect which the law pays to the intent of the testator, where it can be plainly collected from his will, that he used the word heir as a *descriptio personæ*, or sufficient designation of the person for the remainder to vest; for example, where there is a limitation by special designation by will to the heirs of a person *in esse*, as to the heirs of the body of A, now living. The limitation is deemed to be vested in the heirs so designated by purchase, and, therefore, there is no contingent remainder in the case. The word *heirs* is here construed to a word of purchase, and not of limitation, in order to carry out the manifest intention of the testator, which in this instance controls the general rule that *nemo est hæres viventis*.²⁸

1845. When the particular estate is determined or destroyed, before the contingency happens on which they are vested, *contingent remainders become defeated* or destroyed. Therefore when there is a tenant for life, with several remainders in contingency, he may, not only by his death, but by alienation, surrender, or other methods, determine and destroy his own life estate before any remainder can vest; and consequently he defeats them all; as, if there be a tenant for life, with remainder to his eldest son unborn in tail, and the tenant for life, before any son is born, surrenders his life estate, he by that means defeats the surrender in tail to his son; for his son not being *in esse* when the particular estate determined, the remainder could not vest, and as it could not vest then, it could not vest at all.

To prevent this, a special mode of conveyance was adopted, by which a trustee was appointed to preserve the contingent remainders, in whom vested an estate in remainder for the life of the tenant for life, to commence when his estate determines. If, therefore, the estate for life determines otherwise than

²² Fearne, Cont. Rem. *55.

²³ Criswell's Appeal, 41 Penn. St. 290; Macumber v. Bradley, 28 Conn. 445; Jones v. Miller, 13 Ind. 377.

²⁴ Abbott v. Jenkins, 10 Serg. & R. Penn. 296; Tyler v. Moore, 42 Penn. St. 374; Webster v. Cooper, 14 How. 500.

²⁵ Haldeman v. Haldeman, 40 Penn. St. 35.

²⁶ Doe v. Collis, 4 Term, 299; Price v. Sisson, 13 N. J. 177.

²⁷ Coke, Litt. 22, b; Cruise, Dig. t. 16, c. 1, § 38.

²⁸ Burchet v. Durdant, 2 Vent. 311; James v. Richardson, T. Jones, 99.

by death, the estate of the trustees, for the residue of his natural life, will then take effect, and become a particular estate in possession sufficient to support the remainders depending in contingency.

1846. An *executory devise*²⁹ is such a limitation of a future estate or interest in lands as the law admits, in the case of a will, though contrary to the rules of limitation in conveyances at common law; when the object of the gift is a chattel personal, it is more properly called an *executory bequest*.³⁰ It is evident, from the definition, that if the limitation by will does not depart from the rules prescribed for the government of contingent remainders, in that case it is a contingent remainder and not an *executory devise*.³¹

These *executory devises* were instituted for the purpose of supporting the will of a testator when it was evident he intended a contingent remainder, and when it could not operate as such by the rules of law, the limitation was then considered good as an *executory devise*, and this favorable construction was given to wills because the testator being *inops consilii*, he could not be presumed to have acted with as much caution and foresight as he would have done in making a deed.

1847. An *executory devise* differs from a remainder in three material points.

A contingent remainder requires a particular estate to support it; an *executory devise* needs no such particular estate. This happens when a man devises a future estate to arise upon a contingency, and, till the contingency does happen, he does not dispose of the fee simple, but leaves it to descend to his heir at law; as, if one devises land to a feme sole and her heirs, upon her marriage. This is in effect a contingent remainder without a particular estate to support it; a freehold commencing *in futuro*. Though this limitation would be void in a deed, yet it is good as an *executory devise*.³²

A fee simple or other estate cannot, in a remainder, be limited after a fee simple, or, in other words, a remainder cannot be limited after a fee simple; an *executory devise* can be so limited. This happens when the deviser devises his whole estate in fee, but limits a remainder thereon to commence on a future contingency; as, if a man devises lands to A and his heirs, and if he dies before the age of twenty-one years, to B and his heirs; this remainder, though void in a deed, would be good as an *executory devise*.

To prevent perpetuities, a rule has been adopted in both these species of *executory devises* that the contingency must happen during the time of a life in being and twenty-one years afterward and the months allowed for gestation, in order to reach beyond the minority of a person not *in esse* at the time of making the *executory devise*.

A remainder cannot be limited of a chattel interest or term of years after an estate for life has been created out of the same; an *executory devise* can be so created. A term of years may be given by *executory devise* to one man for his life and afterward limited over in remainder to another, which could not be done by deed; for we must remember that a life estate given to a person of any age, how great soever it may be, is greater than the longest term of years, say five hundred years; a grant of it to a man for life was, therefore, considered a total disposition of the whole term. But it was soon held that although by an

²⁹ See as to *Executory Devises*, Comyn, Dig. *Estates by Devise*, N. 16; Fearn, Cont. Rem. *298; Cruise, Dig.

³⁰ Fearn, Cont. Rem. 298.

³¹ *Carwardine v. Carwardine*, 1 Ed. Ch. 27; *Doe v. Morgan*, 3 Term, 763; 1 East, 263; *Haines v. Witmer*, 2 Yeates, Penn. 400; *Dunwoodie v. Read*, 3 Serg. & R. Penn. 440; *Stehman v. Stehman*, 1 Watts, Penn. 475.

³² 2 Sharswood, Blackst. Comm. 173; *Beard v. Rowan*, 1 McLean, C. C. 135.

arbitrary rule such a life estate was greater than the term, yet the deviser might give the remainder by executory devise, and that the devisee for life had no power of alienating the term so as to bar the remainder-man; yet, to prevent the danger of perpetuities, it was soon settled that though such remainders may be limited to as many persons successively as the deviser thinks proper, yet they must all be *in esse* during the life of the first devisee; for then, to use a figure, all the candles are lighted and consuming together, and the ultimate remainder is in reality only to that remainder-man who happens to survive the rest.³³

After having taken this general view of executory devises, we will now consider their different kinds and their limitations.

1848. There are several *kinds of executory devises*: two relative to real estate and one in relation to personal estate. These will be separately examined.

1849. *The first class* is when the deviser parts with his whole estate, but upon some contingency qualifies the disposition of it, and limits an estate on that contingency. For example, when a testator devises to Peter for life, remainder to Paul in fee, provided that if James should, within three months after the death of Peter, pay one hundred dollars to Paul, then to James in fee, this is an executory devise to James, and if he dies during the life of Peter, his heir may perform the condition.³⁴

1850. *The second class* is when a testator gives a future interest to arise upon a contingency, but does not part with the fee in the mean time; as, in the case of the devise of the estate to the heirs of John after the death of John; or a devise to John in fee to take effect six months after the testator's death; or a devise to the daughter of John, who shall marry Robert within fifteen years.³⁵

1851. The executory bequest of a chattel interest is good, even though the ulterior devisee be not at the time *in esse*, and chattels so limited are protected from the demands of creditors beyond the life of the first taker, who cannot pledge them nor dispose of them beyond his own life interest in them.³⁶

1852. By the common law an executory devise, either of real or personal estate, is good if limited to vest within twenty-one years after a life or lives in being; and the contingency may depend upon as many lives in being as the settler pleases, for the whole period is no more than the life of the survivor.³⁷ When the limitation extends beyond this, it is in general too remote and void.³⁸ If the limitation depends upon two alternative events, one of which must hap-

³³ 2 Sharswood, Blackst. Comm. 174, 175. An executory devise differs from a contingent remainder, *first*, because an executory devise is only admitted in last wills and testaments; *second*, because an executory devise respects personal as well as real estate; *third*, because an executory devise requires no preceding estate to support it; *fourth*, because when an estate precedes an executory devise, it is not necessary that the executory devise should vest when such preceding estate determines; *fifth*, because an executory devise can not be prevented or destroyed by any alteration whatsoever in the estate out of which or after which it is limited. Watkins, Conv. 192, *et seq.*; 2 Washburn, Real Prop. *356; McKee v. Means, 34 Ala. N. S. 349; Miller v. Chittenden, 4 Iowa, 252; Proprietors v. Grant, 3 Gray, Mass. 145.

³⁴ 10 Mod. 419; Prec. Chanc. 486. See Holmes v. Holmes, 5 Binn. Penn. 252; Mayer v. Wiltberger, Ga. Dec. part 2, 20; Lewis v. Smith, 1 Ired. No. C. 145.

³⁵ Bate v. Amherst, T. Raym. 82; 1 Salk. 226. See Chambers v. Wilson, 2 Watts, Penn. 495.

³⁶ Hoare v. Parker, 2 Term, 376. See Marston v. Carter, 12 N. H. 159; Gillespie v. Miller, 5 Johns. Ch. N. Y. 21; Merrill v. Emery, 10 Pick. Mass. 507; Ruquey v. Barrett, 12 Mo. 1; Powell v. Brandon, 24 Miss. 343; Fairchild v. Crane, 2 Beasl. Ch. N. J. 105.

³⁷ 2 Sharswood, Blackst. Comm. 174, 175; 1 Sid. 451; Benjough v. Edridge, 1 Sim. Ch. 173, 267.

³⁸ See Moffat v. Strong, 10 Johns. N. Y. 12; Guery v. Vernon, 1 Nott & M'C. So. C. 69; Jackson v. Robbins, 15 Johns. N. Y. 169; 16 Johns. N. Y. 537; Jones v. Sothoron, 10 Gill & J. Md. 187; Miles v. Fisher, 10 Ohio, 1; Proprietors v. Grant, 3 Gray, Mass. 145.

pen within the limit of perpetuity, the limitation over is valid.³⁹ In several of the states these limitations have been regulated or modified by statute.

1853. When an executory devise is limited to take effect on the failure of issue, or after a first devisee's death without heirs, or without issue, or without leaving issue, the limitation is void as being too remote.⁴⁰

But a distinction must be observed between a definite and an indefinite failure of issue. When the precise time for the failure of issue is fixed by the will, as in the case of a devise to Peter; but if he dies without lawful issue living at the time of his death, this is a failure of issue definite. An indefinite failure of issue is the very converse or opposite to this, and it signifies a general failure of issue whenever it may happen without fixing a time or certain or definite period within which it must happen. The issue of the first taker must be extinct, and the issue of the issue *ad infinitum*, without regard to the time or any particular event.

As a general rule, when the failure of issue is definite, as where it is to happen on the death of the first taker, the limitation is not too remote, and the executory devise is valid.⁴¹ And where the generality of the words heirs or issue is restrained by any other words to the period allowed, the devise over will be good.⁴²

The devise of a fee, with the remainder over if the devisee dies without issue or heirs of his body, is a fee cut down to an estate tail, and the limitation is void by way of executory devise as being too remote and founded on an indefinite failure of issue.⁴³ But this rule will not receive its full force when there are additional expressions in the will, though but slight, which show another intention.⁴⁴

1854. A *reversion* is the residue of an estate left in the grantor, now called the reversioner, to commence in possession after the determination of some particular estate granted out by him; it is also defined to be the return of the land to the grantor and his heirs after the grant is over.⁴⁵

An estate in reversion, like a remainder, when actually vested is a present interest, an estate in *presenti*, though it can only take effect in *futuro*.

1855. Unlike a remainder, which must be created by deed or devise, a *reversion* arises by act of law alone.

1856. A *reversion* may be had in an estate in fee, for life, or for years. If the owner of the fee grant a smaller estate to another, the reversion of the fee remains in him; if, having an estate for life, he grant a smaller estate, the reversion for life continues in him; if an estate for years, he grant an estate for a less number of years, the reversion for years still continues in him. In this way there may be several reversions existing in the same estate, they being severally

³⁹ Evers v. Challis, 7 Hou. L. Cas. 555; Fowler v. Depau, 26 Barb. N. Y. 224; Armstrong v. Armstrong, 14 B. Monr. Ky. 333.

⁴⁰ As to the meaning of various phrases like the above, see Nightingale v. Burrill, 15 Pick. Mass. 104; Hall v. Priest, 6 Gray, Mass. 18; Kay v. Scates, 37 Penn. St. 39; Lion v. Burtiss, 20 Johns. N. Y. 483; Varick v. Edwards, 11 Paige, Ch. N. Y. 290; Bell v. Scammon, 15 N. H. 381; Hall v. Chaffee, 14 id. 220; Gray v. Bridgeforth, 33 Miss. 312; Jackson v. Dashiell, 3 Md. Ch. Dec. 257; Black v. McAuley, 5 Jones, No. C. 375; Moore v. Howe, 4 T. B. Monr. Ky. 199; Hollett v. Pope, 3 Harr. Del. 546; Griswold v. Greer, 18 Ga. 545; Condict v. King, 2 Beasl. Ch. N. J. 375.

⁴¹ Eby v. Eby, 5 Penn. St. 461; Moore v. Howe, 4 T. B. Monr. Ky. 199; Bacon, Abr. *Legacies and Devises*, I.

⁴² Cruise, Dig. t. 38, c. 17, § 24; Porter v. Bradley, 3 Term, 143.

⁴³ Irwin v. Dunwoody, 17 Serg. & R. Penn. 61; Caskey v. Brewer, 16 Serg. & R. Penn. 441; Heffner v. Knapper, 6 Watts, Penn. 18; Ide v. Ide, 5 Mass. 500; Newton v. Griffith, 1 Harr. & G. Md. 111; Bell v. Gillespie, 5 Rand. Va. 273.

⁴⁴ Anderson v. Jackson, 16 Johns. N. Y. 382.

⁴⁵ 2 Sharswood, Blackst. Comm. 175; Coke, Litt. 142, b.

fractions of the whole; and all these estates in reversion, together with the estate in possession, make but one estate, namely, a fee simple. The reason for this is, that the fee simple of all lands must abide somewhere, and if he who has before possessed the whole carves out of it any particular estate and grants it away, whatever is not so granted remains in him and his representatives.

1857. *The usual incidents of a reversion* in England are fealty and rent.⁴⁶ In this country fealty in this sense is unknown, and rent is not absolutely inseparable from the reversion. When the lessor leases an estate for years, reserving rent, then he has the reversion with rent; but he might sell the term for so much money in hand, and in this case he would have the reversion without the rent.

1858. As the reversioner has an estate in the land, though he has not a present right of enjoyment, it follows that he may sell the reversion or devise it by his will, and in case of a fee it will descend to his heirs if no will be made, or to his executors or administrators if the estate be only a chattel interest. He may separate the rent from the reversion when originally connected; for he may grant the reversion without the rent, or the rent without the reversion. When the reversion is granted without the rent, there must be an express reservation of the rent in the deed, because without such reservation the rent will be considered as going with it. But by a simple grant of the rent the reversion does not pass.⁴⁷

1859. Having a vested interest in the reversion, the reversioner is entitled to an action for an injury done to the inheritance, when the injury is of a permanent nature, so as to affect his reversionary rights. He may bring an action on the case in the nature of waste against a stranger while the estate is in the possession of the tenant, but trespass will not lie, because there can be no direct injury committed with force against the reversionary rights.⁴⁸

⁴⁶ 2 Sharswood, Blackst. Comm. 176.

⁴⁷ Coke, Litt. 143, 151.

⁴⁸ Bartlett v. Perkins, 13 Me. 87; Simpson v. Burden, 33 id. 549; Ripker v. Sergeant, 7 Watts & S. Penn. 9; Livingston v. Haywood, 11 Johns. N. Y. 429; Chipman v. Emeric, 8 Cal. 283; Chase v. Hazelton, 7 N. H. 175; Bulkley v. Dolbeare, 7 Conn. 232.

CHAPTER XXIII.

NUMBER AND CONNECTION OF TENANTS.

- 1861. Estates in severalty.
- 1862-1874. Joint tenancies.
 - 1863. Creation of a joint tenancy.
 - 1864. What property may be held in joint tenancy.
- 1865-1869. Properties of a joint tenancy.
 - 1866. The unity of interest.
 - 1867. The unity of title.
 - 1868. The unity of time.
 - 1869. The unity of possession.
- 1870-1872. Rights of joint tenants.
 - 1871. Rights pending the tenancy.
 - 1872. Rights of surviving joint tenant.
 - 1873. Joint tenancy, how destroyed.
 - 1874. Joint tenancies in the United States.
 - 1875. Estates in coparcenary.
- 1877-1887. Estates in common.
 - 1879. Creation of tenancy in common.
 - 1880. Rights of tenants in common.
 - 1887. Tenancy in common, how destroyed.

1860. In the preceding chapters legal estates have been considered as to their duration and the quantity of interest which may be had in them; and a view has been taken as to the time when the rights of the parties to them began. We will now inquire into the rights of the tenants as they are: in severalty; joint tenants; coparceners; and tenants in common.

1861. *An estate in severalty* is one which is held by the tenant in his own right only, without any other person being joined or connected with him in point of interest during the continuance of his estate. This is the most usual way of holding estates, and the general rules which are laid down respecting them apply to estates in severalty.

1862. *An estate in joint tenancy* exists where several persons have any subject of property jointly between them in equal shares by purchase, and this, whether the estate be in fee simple, fee tail, for life, for years, at will, or in remainder.¹

1863. The *creation* of this estate depends upon the expressions used in the deed or will by which the tenants hold, for it must be created by the acts of the parties, and does not result from the operation of law; thus, an estate given or granted to any number of persons, without any restrictions or explanations, will be construed to be a joint tenancy.² And such a conveyance to husband and wife will be considered in the nature of a joint tenancy,³ though they do

¹ 1 Washburn, Real Prop. *407; 2 Blackstone, Comm. 179.

² Litt. § 227; Davidson v. Heydon, 2 Yeates, Penn. 459; Gilbert v. Richards, 7 Vt. 203; Martin v. Smith, 5 Binn. Penn. 16.

³ Shaw v. Hersay, 5 Mass. 521; Fox v. Fletcher, 8 Mass. 274; Varnum v. Abbott, 12 Mass. 474; Den v. Hardenberg, 5 Halst. N. J. 42.

not take strictly as joint tenants or tenants in common, they being both seised of an entirety. Neither of them can sell without the consent of the other, and the whole goes to the survivor, unless restricted by statute.⁴ But if the estate is granted to husband and wife and a third person, the husband and wife together take but one-half, and the other joint tenant takes the other.⁵

Joint tenancies cannot arise by descent or act of law, as above observed, but only by purchase.

This estate may be created by disseisin as well as by deed.⁶

1864. Joint interest may be had in the title to the same land, whether it be a fee simple or any smaller estate carved out of the fee. A joint tenancy may be had not only in an estate in possession, but also in a remainder and a reversion.⁷

There may be a joint tenancy not only of lands and tenements, but also of chattels personal and real, such as leases for years, a horse, a ship, and the like; but this rule does not apply to partnership property, for by the law merchants, though the title to it goes to the survivor, yet the beneficial interest of the deceased partner goes to his personal representatives.

Though joint tenancies were favored by the English common law, for the purpose of preventing the diversion of feudal services, yet they are not favored in equity, because they prevent a provision for children, and bar the widow of her just dower. Therefore money loaned by two or more persons on a joint mortgage is not considered joint property.⁸

1865. The nature of a joint tenancy requires the following circumstances, namely: unity of interest; unity of title; unity of time; and unity of possession; or, in other words, joint tenants have one and the same interest; accruing by one and the same conveyance; commencing at one and the same time; and have the same possession.

1866. With respect to *unity of interest*, one tenant cannot be entitled to one period of duration or quantity of interest and the other to a different one; one cannot be tenant for life and the other tenant for years; one cannot be tenant in fee and the other tenant in tail. When land is limited to two tenants for their lives they are joint tenants of the freehold; when to them and their heirs they are joint tenants of the inheritance. But it must be remembered that the joint tenancy is limited only to the estate held by the joint tenants, and if the fee has been carved out, the remainder may be vested in one of the joint tenants of the life estate; for example, when lands are granted to Peter and Paul for their lives, and the remainder to Peter in severalty, here Peter and Paul have a life estate and they are joint tenants as to that, but Peter has a remainder in the fee in severalty. In such case, if Peter should die first, Paul would enjoy the life estate, and on his death Peter's heirs would be entitled to the land.

1867. As to *unity of title*, the estate of the joint tenants must be created by the same act or instrument, whether legal or illegal; as, by one and the same conveyance, or by one and the same disseisin; for a joint tenancy cannot arise by descent, as has been already observed, but merely by purchase or acquisition of the party; and unless the act be the same, they would have different titles,

⁴ *Rogers v. Benson*, 5 Johns. Ch. N. Y. 431; *Thornton v. Thornton*, 3 Rand. Va. 179.

⁵ *Bacon, Abr. Joint Tenants*, B; Litt. § 291; *Back v. Andrew*, 2 Vern. Ch. 120; *Prec. Chanc. 1*. See *Doe v. Wilson*, 4 Barnew. & Ald. 303; *Attorney General v. Bacchus*, 9 Price, Exch. 30.

⁶ *Putney v. Dresser*, 2 Metc. Mass. 583, 586.

⁷ *Coke*, Litt. 183, b.

⁸ *Lake v. Craddock*, 3 P. Will. Ch. 158; *Randall v. Phillips*, 3 Mass. 384.

and if their titles were different, one might be good and the other might be bad, which would absolutely destroy the jointure.⁹

1868. With respect to the *unity of time*, the estate must become vested in all the joint tenants at one and the same instant, as well as by one and the same title. But in this case there are several exceptions, particularly in the case of uses and executory devises. If, for example, a man should make a feoffment in fee to the use of himself for life, and of such a wife as he should afterward marry, for their joint lives, he and his future wife are joint tenants, though they came to their estates at several times; the estate of the wife is in abeyance until marriage, and then it has relation back, and takes effect from the original time of creation. Again, if there be a devise or limitation to the children of A, the estate may vest in joint tenancy in one, and afterward in other children as they are progressively born.¹⁰

1869. There must also be a *unity of possession*. Joint tenants are seised *per my et per tout*, by the half or moiety, and by all; that is, each of them has the entire possession as well of every parcel as of the whole.¹¹ They have not, one a seisin of one-half, and the other a seisin of the other half, neither can one be seised exclusively of one acre and the other of another, but each has an undivided moiety of the whole, and not the whole of an undivided moiety. If an estate in fee be given to a man and his wife, they are not, properly speaking, joint tenants nor tenants in common; because the husband and wife are considered in law as one person, and they cannot, therefore, take by moieties, but both are seised of the entirety, *per tout, et non per my*; consequently, neither of them can dispose of any part without the assent of the other, but the whole must remain to the survivor.¹²

1870. Joint tenants have *rights* and powers during the tenancy, which may be exercised by them either jointly or singly; and the survivor has rights to the whole estate by virtue of the *jus accrescendi*.

1871. *Pending the tenancy*, each of the joint tenants has a right to enter upon the land, when the tenants have a right of possession, and each may exercise at his pleasure every reasonable act of ownership; but one joint tenant is liable to his companion for any waste he may commit upon the estate, and they are severally accountable to each other for the rents and profits of the joint estate.¹³

Though a joint tenant cannot devise his share of the estate, because the moment he dies his right vests in his co-tenant and the devise must take effect after his death, yet he may sell his interest in it, and by that means the joint tenancy is severed, and his co-tenant and the alienee will thereafter be tenants in common.¹⁴

Joint tenants are considered as having an entire and connected right; they must, therefore, join and be joined in all actions respecting the estate.¹⁵

But there are many acts which one of the tenants may do for the benefit of both; such, for example, as a distress which either may make alone for all, because each has an estate in the whole rent.¹⁶ When, convenient, however, it is better for them to join.

1872. Unlike tenants in common, whose estate on the death of one of them is divided between the survivor and the heirs of the deceased, the surviving

⁹ Sharswood, Blackst. Comm. 181.

¹⁰ 2 Preston, Abstr. 67.

¹¹ Wiswall v. Wilkins, 5 Vt. 87; Small v. Clifford, 38 Me. 213; Drane v. Gregory, 3 B. Monr. Ky. 619.

¹² Shaw v. Hersay, 5 Mass. 521; Fox v. Fletcher, 8 id. 274; Varnum v. Abbott, 12 id. 474; Den v. Hardenburg, 5 Halst. N. J. 42.

¹³ Shiels v. Stark, 14 Ga. 429.

¹⁴ Litt. § 288.

¹⁵ 2 Sharswood, Blackst. Comm. 185.

¹⁶ Fisher v. Wigg, 3 Salk. 207.

joint tenant takes the whole of the estate himself, the heirs of the deceased not being entitled to any part of the joint property. This is called the *right of survivorship, or jus accrescendi*. This right is the distinguishing incident of a joint tenancy. The estate held in joint tenancy by the common law, passed to the survivors when there were more than one, and so on to the last survivor, whether the estate in joint tenancy was a fee, or an estate for life or years, or a mere personal chattel. A joint tenant's share of the estate was not subject to the dower of his widow, and he could not devise it by his will. But the part of each joint tenant is charged with judgments or incumbrances expressly created by him.¹⁷

1873. A joint tenancy may be *destroyed* either by the joint act of the two parties, or by the act of one alone. It may be destroyed by the destruction of any of its unities; or,

By the destruction of the unity of interest; as, where two persons are joint tenants for life, and the inheritance is purchased or descends upon either, it is a severance of the jointure; though when an estate is originally limited to two for life, and after to the heirs of one of them, the freehold still remains in jointure without merging in the inheritance, because being created by one and the same conveyance they are not separate estates, and therefore cannot merge, for to make a merger there must be a separate estate; both branches in this case make but one entire estate.

By the destruction of the unity of title. If one joint tenant, therefore, aliens and conveys his estate in the tenancy to a third person the joint tenancy is severed, for then the parties hold by different titles, and become tenants in common. It has been held that a mortgage executed by two of three joint tenants is a severance of the joint tenancy.¹⁸ We have seen that a devise of one's interest by his will has not the same effect.

By the destruction of the unity of time. This it is scarcely possible to destroy, for it respects only the commencement of the joint estate which is now past, and cannot be affected by future acts.

By the destruction of the unity of possession. This unity may be destroyed by merely disuniting the possession. This may be done by a voluntary partition, when each becomes a tenant in severalty of his part. By the common law one joint tenant could not compel the others to make partition, but by the statutes 31 Henry VIII, c. 1, and 32 Henry VIII, c. 32, joint tenants are compelled to make partition of their estate. The principles of these statutes have been re-enacted or adopted in most of the United States, generally with increased facilities for making partition.

1874. This estate is not favored in the United States. By statute in some of the states a conveyance to two or more in their own right will be held to make them tenants in common, unless expressly declared otherwise. This is the case in Alabama, Arkansas, California, Delaware, Illinois, Indiana, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, New Hampshire, New York, New Jersey, Ohio, Oregon, Pennsylvania, Rhode Island, Vermont, and Wisconsin;¹⁹ and the right of survivorship is abolished in Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, Pennsylvania, Rhode Island, South Carolina, Tennessee, and Texas, and never existed in Ohio.²⁰

¹⁷ 2 Preston, Abstr. 65; Remington v. Cady, 10 Conn. 44.

¹⁸ Simpson v. Ammons, 1 Binn. Penn. 175; Rector v. Waugh, 17 Mo. 13; York v. Stone, 1 Salk. 158.

¹⁹ 2 Washburn, Real Prop. 468; Webster v. Vandevanter, 6 Gray, Mass. 428; Purdy v. Purdy, 3 Md. Ch. Dec. 547.

²⁰ Ball v. Deas, 2 Strobb. Eq. So. C. 28; Sargeant v. Steinberger, 2 Ohio, 305.

In Indiana, Massachusetts, Michigan, Minnesota, and Wisconsin joint tenancies may exist as to mortgages in case of devises and of conveyances in trust. So in Vermont, except as to mortgages. In Arkansas, California, Delaware, and Missouri, estates vested in executors or trustees are held in joint tenancy. So in Kentucky and Virginia, where so expressed.

1875. When an estate of inheritance descends from the ancestor to two or more persons, it is called an estate in *coparcenary*, and the heirs are called *coparceners* or *parceners*, because they are compellable to make partition. This is usually applied in England in cases where the lands descend to females, when there are no male heirs.

1876. In this country estates generally descend to children equally, and there is little or no difference between coparcenaries and tenancies in common. The title inherited by more persons than one in some of the states is declared expressly to be a tenancy in common, as in New York and New Jersey; and where it is not so declared, the effect is the same. The technical distinction between an estate in coparcenary and one in common is considered as essentially extinguished in the United States.²¹

At common law the properties of parceners were in some respects like those of joint tenants. They had the same unities of interest, title, and possession. Coparceners hold *per my et per tout*; an entry on the lands by a stranger is, therefore, a trespass for which a coparcener may recover damages and costs.²²

1877. An estate in common is one which is held by two or more persons by unity of possession. This tenancy happens where there is a unity of possession only, although there may be an entire disunity of interest, title, or time. For example, if there are two tenants in common of lands, one may hold his part in fee simple, the other in fee tail, or for life; and in that case there is no unity of interest; one may hold by descent and another by purchase, or one by purchase from Peter and the other from Paul, and then there is no unity of title; one's estate may have been vested fifty years and the other but yesterday, so that there is no unity of time. The only unity is that of possession, and when that is destroyed, the tenants hold in severalty.

1878. This estate differs from one held in severalty in this, that where the estate is in common there must be several persons having an interest in it,²³ whereas an estate in severalty is owned by only one person. It differs from a joint tenancy, because in the latter the tenants must hold by unity of interest, title, time, and possession, whereas in a tenancy in common the only unity required is that of possession. It is unlike a coparcenary at common law, because the coparceners acquire their title by descent only and hold by three unities, namely, those of interest, title, and possession; whereas a tenancy in common may be created by deed or will, and in the United States by descent, and the tenants hold by unity of possession only.

1879. This tenancy is created at common law by express limitation, by deed, or will. The tenants may hold by several and distinct titles, or by title derived at the same time by the same deed or will, or, in the United States, by descent; and in this respect the law of this country differs from that of England. It

²¹ See *Hoffar v. Derwent*, 5 Gill, Md. 132; *Purcell v. Wilson*, 4 Gratt. Va. 16; *Manchester v. Doddridge*, 3 Ind. 360; *Rector v. Waugh*, 17 Mo. 13.

²² *Roach v. Williams*, 2 Const. So. C. 202.

²³ This interest must be in the estate; a mere privilege reserved to a person in a dwelling-house, for a particular purpose, or for a limited time, does not constitute him a tenant in common of the estate. *Abbott v. Wood*, 13 Me. 115. See as to what right makes a tenant in common of lands, *Walker v. Fitts*, 24 Pick. Mass. 191; *Johnson v. Hart*, 6 Watts & S. Penn. 319; *Wiswell v. Wilkins*, 5 Vt. 87; *Jackson v. O'Danaghy*, 7 Johns. N. Y. 247; *Evans v. Brittain*, 3 Serg. & R. Penn. 135; *Caines v. Grant*, 5 Binn. Penn. 119.

may also be created by the destruction of either of the two estates of joint tenancy or coparcenary when such destruction does not sever the unity of possession, but only some one or more of the other unities.

In several of the states joint tenancies have been changed to tenancies in common by the operation of local acts of assembly. And these legislative provisions have been held to be valid because they did not destroy any vested right, as it was uncertain who would be the survivor, and because each of the joint tenants might himself have severed the joint estate by alienation.²⁴

In general, it may be said that in the United States wherever two or more persons acquire the same estate by the same deed, act, or devise, and no indication is made therein to the contrary, they will hold as tenants in common.²⁵

1880. Tenants in common are deemed to have several and distinct freeholds; and this is the principal characteristic of a tenancy in common, though they have no separate estate in any part of the land. Each is considered to be severally and solely seised of his share. They are seised *per my*, but not *per tout*, and consequently they must sue separately in actions savoring of the realty; but they must join in actions relating to some entire and indivisible thing, and in actions of trespass relating to the joint possession,²⁶ or for the recovery of rent by an action of debt. It is owing to this principle that where tenants in common have several estates, each one should distrain for his separate share,²⁷ unless the rent be of an entire thing; as, to render a horse, in which case the thing being incapable of division, they must join.²⁸ Each tenant in common is entitled to receive from the lessee his proportion of the rent; and where a person holding under two tenants in common paid the whole of the rent to one of them after having received a notice to the contrary from the other, it was held the party who gave the notice might afterward distrain.²⁹

1881. As tenants in common have no original privity of estate between them as to their respective shares, one may lease his part of the land to the other, rendering rent, for which a distress may be made, as if the land had been demised to a stranger.³⁰

Each may convey his undivided share in the estate, and this is effected in the same manner as if the tenant in common was seised of the entirety.³¹ But one of them cannot convey one half of the estate by metes and bounds, so as to prejudice his co-tenants or his assignee, although it may bind him by way of estoppel.³²

²⁴ *Bombaugh v. Bombaugh*, 11 Serg. & R. Penn. 192.

²⁵ 1 Washburn, Real Prop. 431; *Miller v. Miller*, 16 Mass. 59; *Gilman v. Morrill*, 8 Vt. 74; *Preston v. Robinson*, 24 *id.* 583; *Evans v. Brittain*, 3 Serg. & R. Penn. 135; *Partridge v. Colegate*, 3 Harr. & M'H. Md. 339; *Briscoe v. McGee*, 2 J. J. Marsh. Ky. 370; *Challefoux v. Ducharme*, 8 Wisc. 287; *Aldrich v. Martin*, 4 R. I. 520.

²⁶ *Merrill v. Berkshire*, 11 Pick. Mass. 269; *Lathrop v. Arnold*, 25 Me. 136; *Gilmore v. Wilbur*, 12 Pick. Mass. 120; *Meredith v. Andres*, 7 Fred. No. C. 5; *Daniels v. Daniels*, 7 Mass. 135. But see *Briscoe v. McGee*, 2 J. J. Marsh. Ky. 370.

²⁷ Litt. §§ 311, 314, 317. See *Rehoboth v. Hunt*, 1 Pick. Mass. 224; *Decker v. Livingston*, 15 Johns. N. Y. 479.

²⁸ Coke, Litt. 197, a.

²⁹ *Harrison v. Barnby*, 5 Term, 246. But before such notice, and before distress and avowry, one tenant in common may receive the whole rent and discharge the lessee, for then the rent is only in personalty. *Decker v. Livingston*, 15 Johns. N. Y. 479.

³⁰ *Brooke*, Abr. *Distress*, pl. 65.

³¹ 2 Preston, Abstr. 277.

³² *Bartlett v. Harlow*, 12 Mass. 348; *Brown v. Wood*, 17 *id.* 68; *Griswold v. Johnson*, 5 Conn. 363; *Jewett v. Stockton*, 3 Yerg. Tenn. 492; *Stanford v. Fullerton*, 18 Me. 229; *Duncan v. Sylvester*, 24 *id.* 482; *Whilton v. Whilton*, 38 N. H. 127; *McKee v. Welch*, 22 Tex. 390.

One tenant in common has a right of enjoyment of the common property, and he may therefore enter upon it without being liable to an action of trespass from the other, unless, indeed, by agreement the other has a right to occupy exclusively such part of the property as has been entered upon.³³

1882. In general, the possession of one tenant in common is the possession of the others, and the taking of the profits does not amount to an ouster of his companions. The possession of one tenant in common is *prima facie* evidence of the possession of his co-tenant.³⁴ But one may actually oust the others by taking possession adversely and claiming to hold in his own right; and when there are sufficient grounds to presume an ouster, the other will be driven to his action of ejectment.³⁵

1883. Each of the tenants in common can compel a partition, is liable to the others for waste or any misuse or destruction of the common property which is negligent or wilful,³⁶ and in some cases for an excess of profits beyond his share.³⁷

1884. Tenants in common and joint tenants are jointly liable for expenses incurred in making necessary repairs of a house or a mill, though this liability is limited to those parts of the common property; a co-tenant is not bound to repair a fence enclosing wood or arable land. This was effected at common law by the writ *de reparatione facienda*, but the more easy remedy, by compelling a partition when one of the tenants refuses to repair, has rendered this writ very nearly obsolete.³⁸

1885. But although tenants in common are all liable for repairs to the common property, they are not bound to pay for buildings erected on the premises, or for permanent improvements made by one of the tenants in common without their consent. Although such erections and improvements might be ultimately beneficial to the estate, and though the inconvenience of paying for them might not be felt by the tenant who erected them, yet the expense might ruin the other; besides, that would be compelling a man to do what he was not bound to perform.³⁹ If such improvements have been made *bona fide*, although the expenditures are not a lien upon the land, yet in making partition a court of equity will first direct an account and suitable compensation, or assign to the tenant who made them that portion of the premises where such improvements have been made.⁴⁰

³³ Keay v. Goodwin, 16 Mass. 1; Clowes v. Hawley, 12 Johns. N. Y. 484; Jones v. Chiles, 8 Dan. Ky. 163; McPherson v. Seguire, 3 Dev. No. C. 153; Lawton v. Adams, 29 Ga. 273; Filbert v. Hoff, 42 Penn. St. 97.

³⁴ Phillips v. Gregg, 10 Watts, Penn. 158; Hall v. Matthias, 4 Watts & S. Penn. 336. See Carothers v. Dunning, 3 Serg. & R. Penn. 381; Lloyd v. Gordon, 2 Harr. & M'H. Md. 254; Thornton v. York Bank, 45 Me. 158; Poage v. Chinn, 4 Dan. Ky. 50; German v. Machin, 6 Paige, Ch. N. Y. 288; Thomas v. Hatch, 3 Sumn. C. C. 170.

³⁵ Coke, Litt. 199, b; Liscomb v. Root, 8 Pick. Mass. 376; Rickard v. Rickard, 13 Pick. Mass. 253; Galbraith v. Galbraith, 5 Watts, Penn. 146; Nichol v. McFarlane, 3 Watts, Penn. 165; Gause v. Wiley, 4 Serg. & R. Penn. 537; Thomas v. Pickering, 13 Ma. 337; Colborn v. Mason, 25 Me. 434; Story v. Saunders, 8 Humphr. Tenn. 663; Gill v. Fountleroy, 8 B. Monr. Ky. 177; Gray v. Givens, 1 Ril. Ch. So. C. 41; Corbin v. Cannon, 31 Miss. 570; Forward v. Detz, 32 Penn. St. 69; Hoffstetter v. Blattner, 8 Mo. 276; Abercrombie v. Baldwin, 15 Ala. 363; Roberts v. Morgan, 30 Vt. 319; Meredith v. Andres, 7 Ired. No. C. 5.

³⁶ Andres v. Meredith, 4 Dev. & B. No. C. 199; Shiels v. Stark, 14 Ga. 429.

³⁷ Calhoun v. Curtis, 4 Metc. Mass. 413; Peck v. Carpenter, 7 Gray, Mass. 283; Huff v. McDonald, 22 Ga. 181; Gowen v. Shaw, 40 Me. 56; Pico v. Columbe, 12 Cal. 414; Keisel v. Earnest, 21 Penn. St. 90; Holt v. Robertson, 1 M'Mull. Ch. So. C. 475.

³⁸ Doane v. Badger, 12 Mass. 65; Mumford v. Brown, 6 Cow. N. Y. 475.

³⁹ Crest v. Jack, 3 Watts, Penn. 238; Thurston v. Dickinson, 2 Rich. Eq. So. C. 317.

⁴⁰ Green v. Putnam, 1 Barb. N. Y. 500; Crofts v. Crofts, 13 Gray, Mass. 360.

1886. Estates in common, not being subject to survivorship, are, when the husband is a tenant in common, subject to the widow's dower, and when the wife is such tenant, liable to the curtesy of the husband as the other lands of the wife.⁴

1887. Estates in common can be dissolved only in two ways: By uniting all the titles of all the tenants and all their interests in one single tenant, whether such union take place by purchase, by descent, or in any other manner; and in this case the tenant, having all the title and interest, becomes a tenant in severalty. By making a partition of the property held in common among the several tenants, which gives them a severalty each in his own proper share.

⁴ Crabb, Real Prop. § 2318.

CHAPTER XXIV.

USES AND TRUSTS.

- 1888. Equitable estates.
- 1889-1897. Uses.
 - 1890. History of uses.
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1888. In the preceding chapters having considered the nature of legal estates, the next subject to be examined is the nature of equitable estates. An *equitable estate* is a right or interest in land, which, not having the properties of a legal estate, but being merely a right of which courts of equity will take notice, requires the aid of such court to make it available. These estates may be conveniently considered under the heads of uses, trusts, and powers.¹

1889. *Use* at common law is defined to be a confidence reposed in another, who was made tenant of the land, or *terre tenant*, that he should dispose of the land according to the intention of the *cestui que use* or him for whose use it was granted, and suffer him to take the profits.²

The person to whom the estate is granted is called the *feoffe* or *terre tenant*, and the one for whom it was granted was denominated the *cestui que use*.

1890. Uses were borrowed from the *fidei commissum* of the civil law. The following example of a *fidei commissum* will clearly show the resemblance of a

¹ Willett v. Sanford, 1 Ves. sen. Ch. 186.

² Plowd. 352; Gilbert, Uses, 1; 2 Sharswood, Blackst. Comm. 328; Sanders, Uses, 2; Cornish, Uses, 13; 1 Bacon, Tracts, 150, 306; Coke, Litt. 272; 1 Fonblanque, Eq. 363; Bacon, Abr. *Uses and Trusts*.

use to it: when a testator writes, "I institute for my heir, Lucius Titius," and adds, "I pray my heir, Lucius Titius, to deliver, as soon as he shall be able, my succession to Caius Seius."³ When such a gift was made, it was the duty of the Roman magistrate, the prætor fidei commissarius, whom Bacon terms the particular chancellor for uses, to enforce the observation of this confidence.⁴

Uses were introduced into England by the ecclesiastics in the reign of Edward III for the purpose of avoiding the statute of mortmain, by obtaining grants of lands, not to the religious houses directly, but to the use of the religious houses, and the chancellors of those times held these to be *fidei commissa*, and binding in conscience, and soon assumed the jurisdiction which had been granted to the Roman prætor of compelling the execution of such trusts in the court of chancery.

To obviate many inconveniences and difficulties which had arisen out of the doctrine and introduction of uses, the statute of 27 Henry VIII, c. 10, commonly called the statute of uses, or the statute for transferring uses into possession, was passed. It enacts that "when any person shall be seised of lands, etc., to the use, confidence, or trust of any other person or body politic, the person or corporation entitled to the use in fee simple, fee tail, for life, or years, or otherwise, shall from thenceforth stand and be seised or possessed of the land, etc., of, and in the like estate as they have in the use, trust, or confidence; and that the estate of the person so seised to the uses shall be deemed to be in him or them that have the use, in such quality, manner, form, and condition as they had before in the use." The statute thus executes the use, that is, it conveys the possession to the use, and transfers the use to the possession, and in this manner making the *cestui que use* complete owner of the lands and tenements as well at law as in equity.⁵

1891. A modern use has been defined to be an estate of right, which is acquired through the operation of the statute of 27 Henry VIII, c. 10; and which, when it may take effect according to the rules of the common law, is called a legal estate; and when it cannot, it is denominated a use with a term descriptive of its modification.⁶

In the construction of this statute, the judges of the courts of common law decided that a use could not be raised upon a use,⁷ and that on a feoffment to A and his heirs, to the use of B and his heirs, in trust for C and his heirs, the statute executed only the first use, and that the second was a mere nullity. The judges also held that as the statute mentioned only such persons as were seised to the use of others, it did not extend to a term of years, or other chattel interests of which a termor is not seised, but only possessed.⁸ This rigid literal construction of the statute by the courts of law opened wider than before the doors of the court of chancery.⁹ This statute, thus made upon great consideration, and introduced in the most solemn manner, by a strict construction has had no other effect than to add at most three words to a conveyance. In the exercise of this jurisdiction, courts of equity have in a great degree wisely avoided those mischiefs which made uses intolerable. They now consider a trust estate as equivalent to a legal ownership, governed by the same rules of property, and liable to the same charges in equity, except dower, to which the other is subject at law. Trusts, which are now, in some degree at least, what uses were before

³ Inst. 2, 23, 2; Vide Code, 6, 42.

⁴ Bacon's Read. on the Stat. of Uses, Law Tracts, 315.

⁵ 2 Sharswood, Blackst. Comm. 333; 1 Saund. 254 note (b).

⁶ Cornish, Uses, 35.

⁷ Dy. 155, a.

⁸ Bacon, Tr. 335; Poph. 76; Dy. 369.

⁹ 1 Madd. Ch. 448, 450.

the enactment of the statute of 27 Henry VIII, c. 10, are made to answer in general all the beneficial ends of uses, without their inconvenience or frauds.¹⁰

The *cestui que use* takes the legal estate under the statute according to the quality, manner, and form as he had in the use.

1892. In order to distinguish the nice and varying character of uses it is proper to consider the various kinds into which they have been divided. They are: springing uses; shifting uses; resulting uses; and contingent uses.

1893. *Springing uses* are those which are limited to arise on a future event, where no preceding estate is limited, and do not take effect in derogation of any preceding interest. Example: a grant is made to Peter in fee for the use of Paul in fee after the fourth of July next; no use arises till the limited period. The use in the mean time results to the grantor, who has a determinable fee.

These springing uses, like executory devises, must be limited to take effect within the period prescribed by law to avoid perpetuities; therefore, a feoffment to the use of the right heirs of A after the death of A, if he die without issue within a certain time, is a good future use;¹¹ but a dying without issue generally, without any definite time, is a void limitation.

In order to prevent perpetuities, when an estate can take effect as a remainder it is never construed as an executory devise or a springing use.¹²

A good springing use must be limited at once, independently of any preceding estate and not by way of remainder, for then it becomes a contingent and not a springing use; and contingent uses are subject to the same rules precisely as contingent remainders.

Springing uses may be raised by any form of conveyance; but in conveyances which operate by way of transmutation of possession, as a feoffment, or a deed of lease and release, the estate must be conveyed and raised out of the seisin created in the grantee by the conveyance.

There is another mode of conveyance by which uses may be raised, which operates not by transmutation of the estate of the grantor, but the use is severed out of the grantor's seisin, and executed by the statute. This takes place when there are covenants to stand seised to uses, and in conveyances by bargain and sale.¹³

1894. A *shifting use* is one which takes effect in derogation of some other estate, and is either limited by the deed creating it, or authorized to be created by some person named in it. This is sometimes called a secondary use. The following is an example: If an estate be limited to A and his heirs, with a proviso that if B pay A one hundred dollars on the fourth of July next, the use to A shall cease, and the estate go to B in fee; the estate is vested in A, subject to the shifting or secondary use to B in fee. Again, if the proviso be that C may revoke the use to A and limit it to B, then A is seised in fee, with a power in C to revoke and remit a new use.¹⁴ Again, if a use be limited jointly to two persons not *in esse*, and the one comes to be *in esse*, he shall take the entire use; and yet if the other afterward comes *in esse*, he shall take jointly with the former; as, if a man make a feoffment to the use of his intended wife and of his first-born son, and he afterward marry, his wife shall take the

¹⁰ Fonblanque, Eq. Tr. 15; 1 Atk. Ch. 591; Bacon, Abr. *Uses and Trusts*, part 2, *in princ.*; Fisher v. Field, 10 Johns. N. Y. 494; 2 Sharswood, Blackst. Comm. 337. The Statute of Uses was suggested to Henry VIII by his judges, as we learn from Brent's Case, 2 Leon. 17, in order to gratify his royal taste for confiscations.

¹¹ 12 Mod. 39.

¹² Goodtitle v. Billington, 2 Dougl. 757.

¹³ 4 Kent, Com. *298, 4th ed.

¹⁴ Brooke, Abr. *Feoffm. al Uses*, 339, a, pl. 30; Gilbert, *Uses*, 152; Crabb, *Real Prop.* § 1681.

whole use, and if afterward he have a son, such son shall take jointly with the wife.¹⁵

These shifting uses must be kept within proper limits so as not to tend to a perpetuity, which is defined to be any limitation tending to take the subject of it out of commerce for a longer period than a life or lives in being, and twenty-one years beyond; and in case of a posthumous child a few months more, allowing for the term of gestation;¹⁶ or it is such a limitation of property as renders it inalienable beyond the period allowed by law.¹⁷ If, therefore, the object of the power be to create a perpetuity, it is void; as, where in a strict settlement a power was inserted authorizing trustees, on the birth of each then unborn tenant in tail, to revoke the uses limited to them, and to limit the estate to them for their lives, with remainders to their sons in tail, this was held to be a void power tending to a perpetuity, and repugnant to the estate limited.¹⁸

1895. A *resulting use* is one which, having been limited by deed, expires and cannot vest; it then returns back to him who raised it after such expiration, or during such impossibility.

When the legal seisin and possession of land are transferred by any common law conveyance, and no use is expressly declared, nor any consideration nor evidence of intent to direct the use, such use shall result back to the original owner of the estate, for it cannot be supposed that he meant to give it away. The following is an instance of a resulting use: When a man makes a feoffment to the use of his intended wife for life, with remainder to the use of her first-born son in tail, till he marries the use results back to himself; after marriage it is executed in the wife; and if she dies without issue, the whole results back to him in fee.¹⁹

1896. A *contingent or future use* is one limited in a deed or conveyance of land which may or may not happen to vest, according to the contingency expressed in the limitation of such use; or it is such use as may happen in possession, reversion, or remainder. For example, if land be granted to Peter in fee to the use of Paul on his return from London, the use is contingent, because it is uncertain whether Paul will ever return.

1897. The principles of the statute of 27 Henry VIII, c. 10, have been generally introduced in the United States. But, as in all cases of this kind, where there are so many legislatures to re-enact the provisions of a statute, and so many supreme tribunals to construe those enactments, it is impossible that they should be exactly the same, though they may bear a general resemblance.²⁰

1898. Formerly uses and trusts were considered as being synonymous, and both are mentioned in the statute of 27 Henry VIII.²¹ We have seen that the object of that statute was to abolish uses, and that the judges construed it in such manner that it could execute only the first use where property was given to several uses, and that the last use was considered as invalid, or, in other words, that a use upon a use was void; as, where lands were given Primus, for the use of Secundus, for the use of Tertius, the legal seisin and possession were transferred to Secundus, and Tertius took nothing. In this case, courts of

¹⁵ Bacon, Read. Uses, 63; 1 Rolle, Abr. 415, pl. 12.

¹⁶ Randall, Perp. 48.

¹⁷ Gilbert, Uses, by Sugden, 260, note.

¹⁸ Spencer v. Duke of Marlborough, 5 Brown, Parl. Cas. 592; Crabb, Real Prop. § 1686.

¹⁹ Bacon, Uses, 350; 2 Sharswood, Blackst. Comm. 335.

²⁰ See 4 Kent, Com. 299, 4th ed.; 1 Hilliard, Real Prop. c. 21, § 2; Laurens v. Jenney, 1 Speers, So. C. 356; Matthews v. Ward, 10 Gill & J. Md. 443; Bryan v. Bradley, 12 Conn. 474; Welch v. Allen, 21 Wend. N. Y. 147.

²¹ Bacon, Abr. Uses and Trusts; Viner, Abr. Trusts; Comyn, Dig.; Cruise, Dig. tit. 12; Lewin, Trusts; Willis, Trusts; 1 Browne, Civ. Law, 190. For the origin of trusts in the civil law, see 5 Toullier, Dr. Civil Français, liv. 3, t. 2, c. 1, n. 18.

equity supported the rights of Tertius, and held that the property was a trust for him, and enforced his rights accordingly. In fact, uses were in these cases thus revived under the name of trusts. A trust is therefore a use not executed by the statute of 27 Henry VIII.

In its general sense, a *trust* is an equitable right, title, or interest in property, real or personal, distinct from its real ownership; or it is a personal obligation for paying, delivering, or performing any thing where the person trusting has no real right or security, for by that act he confides to the faithfulness of those intrusted; this is its most general meaning, and includes deposits and other bailments. In a technical sense, when applied to real property; a trust estate may be described to be a right in equity to take the rents and profits of lands, the legal estate of which is vested in some other person; or it is the disposition which one makes of property in favor of one person through the instrumentality of another, who is required to complete it.

1899. The person to whom the legal estate is granted or devised is called the trustee, and he for whose benefit it is so granted or devised is denominated the *cestui que trust*.²²

We will now briefly consider the different kinds of trusts, how a trust is created, the trustee, the *cestui que trust*, and the destruction of trust estates.

1900. Considered as to their nature, trusts are divided into simple and special.

A *simple trust* corresponds with the ancient use, and is where property is simply vested in one person for the use of another, and the nature of the trust, not being qualified by the settler, is left to the construction of law.

A *special trust* is where a trustee is interposed for the execution of some purpose particularly pointed out, and the trustee is not, as before, a mere passive depositary of the estate, but is required to exert himself actively in the execution of the settler's intention; as, where the conveyance to trustees is upon trust to re-convey or to sell for the payment of debts. These special trusts have again been sub-divided into ministerial or instrumental and discretionary. Of the first class are those which demand no further exercise of reason or understanding than every intelligent agent must necessarily employ; as, to convey an estate. Those of the second class are such as cannot be duly administered without the application of a certain degree of prudence and judgment; as, when a fund is given to trustees to be distributed in certain charities to be selected by the trustees.

1901. When examined as to the manner of their creation, trusts are express or implied.

Express trusts are those which are created in express terms in the deed, writing, or will. The term, to create an express trust, will be sufficient, if it can be collected upon the face of the instrument that a trust was intended. Express trusts are usually found in preliminary sealed agreements, such as marriage articles, or articles for the purchase of land; in formal conveyances, such as settlements, terms of years, mortgages, assignments for the payment

²² This awkward phrase, to denominate him who trusts, is in the old Norman French language. It has been justly objected to as being an ungainly phrase which might be substituted by the word beneficiary, or fide commissary. In the Roman laws the trustee is called the *hæres fiduciarius*, and the *cestui que trust* is denominated *hæres fidei commissarius*. Doctor Halifax has translated it *fide committee*. Halifax, Civil Law, 34, 46. Judge Story prefers *fide commissary*, as equally at least within the analogy of the English language. 1 Story, Eq. Jur. § 321, note. Bowyer uses the word *fidei commissary*. Mod. Civ. Law, Ch. 25, p. 150. Professor Walker, in his Intro. to American Law, 311, and Judge Story, loc. cit. prefer the term beneficiary as being the best adapted for the purpose, and most in analogy with the language. Almost any term might be substituted for the one now in use. In the French law, the *cestui que trust* is called *fidei commissaire*.

of debts, raising portions, or other purposes; and in wills and testaments, when the bequests involve fiduciary interests for private benefit or public charity.

Implied or resulting trusts are those which, without being expressed, are deducible from the nature of the transaction as matters of intent, or which are superinduced upon the transaction by operation of law as matters of equity, independently of the particular intention of the parties.²³ These implied trusts greatly extend over the business and pursuits of men. A few examples will make this manifest:

When land is purchased by one man in the name of another and the former pays the consideration money, the land will in general be held by the grantee in trust for the person who so paid the consideration money.²⁴

When real property is purchased out of partnership funds and the title is taken in the name of one of the partners, he will hold in trust for all the partners.²⁵

When a contract is made for the sale of land in equity, the vendor is immediately deemed a trustee of the estate for the vendee, and the vendee a trustee of the purchase money for the vendor; and by this means there is an equitable conversion of the property.²⁶

When land is purchased with trust money, a resulting trust arises in the person entitled to it; in other words, the trust fund can be followed.²⁷

When land is conveyed to a stranger without any consideration, there is a resulting trust to the legal owner; in conformity to the old doctrine that where a feoffment was made without consideration the use resulted to the feoffor.²⁸

Where the legal estate is conveyed to a trustee, and the trust is declared as to part only, nothing being said of the rest, that which is not disposed of results to the original owner.²⁹

It is a rule that where the whole of an estate is conveyed for particular purposes, or upon particular trusts only, which by accident or otherwise cannot take effect, a trust will result to the original owner or his heirs.³⁰ But in a case of this kind there are several exceptions. If Primus devised lands to Secundus, to sell to Tertius, for the particular advantage of Tertius, that advantage is the only purpose to be served, according to the intent of the testator; and it is satisfied by the mere act of selling, let the money go where it will.³¹

Where a person makes a conveyance of the legal estate to trustees, upon such trusts and such intents of purposes as he shall appoint, and never makes an appointment, there will be a resulting trust to him and his heirs.

When, in consequence of a fraud, a conveyance of land is obtained, the

²³ Bacon, *Abr. Uses and Trusts*, part 2 (c), Bouvier, ed.

²⁴ Comyn, *Dig. Chancery*, 3 W. 3; 2 Fonblanque, *Eq. Tr.* b. 2, c. 5, § 1, note (a); Story, *Eq. Jur.* § 1201; Jackman v. Ringland, 4 Watts & S. Penn. 149; see Peabody v. Tarbell, 2 Cush. Mass. 232; Whitten v. Whitten, 3 *id.* 194; Crabb v. Crabb, 1 Mylne & K. Ch. 511.

²⁵ Montague, *Partn.* 97, n.; Collyer, *Partn.* 68; Powell v. Manuf. Co., 3 Mas. C. C. 347; 4 Des. Eq. So. C. 486; 3 Litt. Ky. 399; 2 Wash. C. C. 441; Hoxie v. Carr, 1 Sumn. C. C. 182.

²⁶ Fonblanque, *Eq. Tr.* b. 1, c. 6, § 9, note (t); Story, *Eq. Jur.* §§ 789, 790, 1212.

²⁷ Ryal v. Ryal, *Ambl. Ch.* 413; see Wallace v. Duffield, 2 Serg. & R. Penn. 521; Oliver v. Piatt, 3 How. 333; Craig v. Leslie, 3 Wheat. 577.

²⁸ Norfolk v. Browne, 1 Ab. Eq. 381; Prec. Ch. 20; Pinney v. Fellows, 15 Vt. 538; Botsford v. Burr, 2 Johns. Ch. N. Y. 405.

²⁹ Lloyd v. Spillet, 2 Atk. Ch. 150; Davidson v. Foley, 2 Brown, Ch. 203; Cook v. Hutchinson, 1 Keen, Ch. 42; Cox v. Parker, 22 Beav. Rolls, 168; Dunne v. Dunne, 7 De Gex, M. & G. 207.

³⁰ Jackman v. Ringland, 4 Watts & S. Penn. 149.

³¹ Hill v. Epis. London, 1 Atk. Ch. 618.

grantee in such conveyance will be considered in equity as a trustee for the person who has been defrauded.³²

1902. Trusts, as to their *effects*, are said to be executed and executory. But this must be understood in a limited sense, for in an enlarged meaning all trusts are executory.³³

A trust is *executed* where the limitations of the equitable interest are complete and final; as, when the legal estate passes in a conveyance to Primus for the use of Secundus; or when only an equitable title passes; as, in the case of a conveyance to Primus for the use of Secundus in trust for Tertius. In this last case the trust is executed in Tertius, though he has not the legal estate.³⁴

A trust is *executory* where the limitations of the equitable interest are not intended to be complete and final, but merely to serve as minutes or instructions for perfecting the settlement at some future period.³⁵

1903. As to the *creation* of a trust we shall consider the formalities requisite to be observed in the creation of a trust and the words by which it may be declared.

1904. It will be proper to examine the nature of trusts as they stood at common law, and afterward as they are affected by the statute of frauds.

By the *common law* a trust of land might have been declared by parol; as, where an estate was conveyed unto and to the use of A and his heirs, a trust might have been raised by parol in favor of B.³⁶ But a trust was not permitted to be raised by parol in contradiction to any expression of intention on the face of the instrument itself.³⁷

By the English *statute of frauds*, 29 Charles II, c. 3, s. 7, it is enacted that "all declarations or creations of trusts or confidences of any lands, tenements, or hereditaments shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect."

Let us briefly examine what interest in lands, etc., are within the act, and, next, what formalities are to be observed in the declaration of trust.

1905. The words of the statute are "lands, tenements, and hereditaments;" these undoubtedly include chattels real,³⁸ but chattels personal do not come within them.³⁹

1906. It is not required by the statute that trusts should be necessarily declared in writing, but only to be "manifested and proved" by writing; for, where there is written evidence of the existence of such trust, the danger of parol declarations, against which the statute was directed, is effectually removed.⁴⁰ Any subsequent acknowledgment of the trustee, however informally

³² Lloyd v. Spillet, 2 Atk. Ch. 150; Rutherford v. Ruff, 4 Des. Eq. So. C. 350; 1 Paige, Ch. N. Y. 47; 1 Cooke, 166.

³³ Jervoise v. Duke of Northumberland, 1 Jac. & W. Ch. 570; Exel v. Wallace, 2 Ves. Ch. 323.

³⁴ 1 Preston, Estates, 190.

³⁵ Lewin, Trustees, 48, 49, 50; see Dennison v. Gochring, 7 Penn. St. 177.

³⁶ See Ballasis v. Compton, 2 Vern. Ch. 294; 3 Brown, Ch. 587; Sprague v. Woods, 4 Watts & S. Penn. 192.

³⁷ Lewis v. Lewis, 2 Chanc. Cas. 77.

³⁸ Skett v. Whitmore, Freem. Ch. 280; Foster v. Hale, 3 Ves. Ch. 696.

³⁹ Bayley v. Boulcott, 4 Russ. Ch. 347.

⁴⁰ Foster v. Hale, 3 Ves. Ch. 707; Fisher v. Field, 10 Johns. N. Y. 495. In Pennsylvania, the trust may be established by parol. Miller v. Pearce, 6 Watts & S. Penn. 97. But see Leshey v. Gardner, 3 Watts & S. Penn. 314; Simplex v. Coulson, 9 Watts & S. Penn. 62; in such case the evidence should be plain and unambiguous. Slocum v. Marshall, 2 Wash. C. C. 397; Peebles v. Reading, 8 Serg. & R. Penn. 492; Hoge v. Hoge, 1 Watts, Penn. 163.

or indirectly made; as, by a letter under his own hand,⁴¹ his answer in chancery,⁴² or by a recital in a deed,⁴³ will be sufficient. But then they must clearly relate to the subject matter of the trust, for if the trust is not so clearly ascertained from the papers it cannot be enforced. And when it is established by an answer in chancery, the terms of it must be regulated by the whole answer as it stands, and not to be taken from one part of the answer to the rejection of another.⁴⁴ These declarations are generally made by a formal deed executed by the trustee, in which the trusts are specially set forth.

The statute of frauds, so far as it is now under consideration, has been adopted or re-enacted in most of the United States with certain modifications. In North Carolina the law is the same on this point as it was in England before the passage of the statute of frauds, and a parol declaration of trust of land is valid.⁴⁵

A trust, as we have seen when considering implied, trusts may be created by implication.

1907. A trust may be created by any words which make the meaning of the party clear and definite, there being no technical or particular set of words required for the purpose. When he makes use of technical words only they will be construed in a legal sense;⁴⁶ if, however, a testator use other words which manifestly indicate what his intention was, and show to a demonstration that he did not mean what the technical words import in the sense which the law has imposed upon them, that intention must prevail, notwithstanding he has used such technical words in other parts of his will.⁴⁷

It is not requisite that the words should be imperative, as, "I order and direct," but terms of recommendation will be sufficient to create a trust; as, "I hope," "I do not doubt;" and precatory words will have the same effect; as, "I desire," "I will," "I entreat," and "I most earnestly beseech."⁴⁸

1908. The trustee must be capable of executing the trust; he is entitled to certain rights and liable to certain obligations.

1909. All persons *sui juris* are capable of being trustees,⁴⁹ and even a married woman may act in that capacity, though she may be discharged if her husband is abroad and not within reach of the process of the court.⁵⁰ An infant may also be appointed trustee, and the trust shall not fail in consequence of his appointment, though there is a stronger reason against his serving as trustee than against a married woman, because she has capacity and he wants it.⁵¹ A husband may be a trustee for the benefit of his wife, if duly appointed.⁵² But trusts are not confined to the care of living persons; corporations may also act in the capacity of trustees.⁵³

1910. Not only those persons who are actually appointed trustees will be so considered; equity converts all persons seised of or acquiring the legal estate, who are aware of the trust,⁵⁴ into trustees; but a purchaser for a valuable con-

⁴¹ 3 Ves. Ch. 696.

⁴² Hampton v. Spencer, 2 Vern. Ch. 288.

⁴³ Deg v. Deg, 2 P. Will. Ch. 402.

⁴⁴ 2 Vern. Ch. 288.

⁴⁵ Foy v. Foy, 2 Hayw. No. C. 131; see Miller v. Pearce, 6 Watts & S. Penn. 97.

⁴⁶ Hodgson v. Ambrose, 1 Dougl. 340, a.

⁴⁷ Barr's Estate, 2 Penn. St. 428; 1 Dougl. 340, a.

⁴⁸ Bacon, Abr. *Legacies*, B.

⁴⁹ Commissioners v. Walker, 7 Miss. 143.

⁵⁰ Lake v. De Lambert, 4 Ves. Ch. 595; see Commissioners v. Walker, 7 Miss. 143.

⁵¹ Hearle v. Greenbank, 3 Atk. Ch. 712; 1 Ves. Ch. 305.

⁵² Porter v. Bank of Rutland, 19 Vt. 410.

⁵³ Phillips' Academy v. King, 12 Mass. 546; Vidal v. Girard's Ex'rs. 2 How. 127.

⁵⁴ Thompson v. Wheatley, 13 Miss. 499. In a case where the purchaser of the land had no notice of a trust, and he afterward sold to another who knew the land had been held in trust, the latter's title was not affected by the fact that he had notice. Bracken v. Miller, 4 Watts & S. Penn. 102.

sideration, without notice, is not so considered;⁵⁵ and on the death of the trustee, the heir, executor, or administrator becomes the legal owner, and bound by the trust,⁵⁶ and so will be an assignee of a bankrupt or insolvent trustee.⁵⁷

1911. The legal estate may be vested in a trustee by express words; as, when land is granted or devised to A and his heirs to the use of A and his heirs in trust for B and his heirs, for by this form of limitation the trustee is in by common law, and the use and the possession, which constitute the legal estate, are both vested in him by the statute; but when lands are given to trustees upon special trusts it then becomes doubtful whether an entire or a partial disposition has been made to them; as, when the limitation is to A and his heirs, upon trust to pay the rents to B; this has been held to give them the legal estate, and in the case of wills the whole depends upon the testator's intent.

1912. The legal estate also vests in trustees where it is given to them to sell or mortgage for the payment of debts,⁵⁸ or to convey an estate,⁵⁹ or to support contingent remainders,⁶⁰ or to hold for the use of a *feme covert*, is a trust and not a use executed.

1913. Unlike the right which a feoffee had in the land which he held for the use of another, a trustee cannot encumber the estate by suffering a judgment, and the trust estate is not liable to the dower of the wife or the curtesy of the husband of a female trustee. The trustee holds the legal estate only for the benefit of the *cestui que trust*.⁶¹

1914. With regard to the *duties* of the trustees, it is held, in conformity to the old law of uses, that pernaney of the profits, execution of estates, and defence of the land are the three great properties of a trust, so that courts of chancery will compel trustees—

To permit the *cestui que trust* to receive the rents and profits of the land.

To execute such conveyances, in accordance with the provisions of the trust, as the *cestui que trust* shall direct.

To defend the title to the land in any court of law or equity.⁶²

It is scarcely possible in an elementary work to give all the rules in relation to the duties and obligations of trustees. In many cases it is not easy to say what those duties are. It often becomes highly proper, and, indeed, indispensable for his security, that a trustee, before he acts, should seek the aid of a court of equity.⁶³

One of the principal obligations of a trustee is to render a just and true account of the trust; and when he has received money belonging to the *cestui que trust* to pay it over.

Trustees are required to act toward the trust property with reasonable diligence; to prevent waste or delay or injury to trust property; to keep the *cestui que trust* notified, as far as practicable, of all facts which it may be his interest to know; and where the trustee has not the proper information, to seek it, and, if practicable, obtain it.⁶⁴

Whenever special instructions are given by the instrument, or special duties

⁵⁵ 2 Freem. 43, pl. 47; *Payne v. Compton*, 2 Younge & C. Ch. 457; *Nash v. Cutler*, 19 Pick. Mass. 67; *Crane v. Keating*, 13 Pick. Mass. 339; see *Stiver v. Stiver*, 8 Ohio, 217; *Scott v. Gallaher*, 14 Serg. & R. Penn. 333.

⁵⁶ *Cole v. Moore*, F. Moore, 806; *Rogers v. Ross*, 4 Johns. Ch. N. Y. 388.

⁵⁷ *Bennet v. Davis*, 2 P. Will. Ch. 316; *Twelves v. Williams*, 3 Whart. Penn. 485.

⁵⁸ *Steel v. Henry*, 9 Watts, Penn. 528.

⁵⁹ *Garth v. Baldwin*, 2 Ves. Sen. Ch. 646; *Doe v. Field*, 2 Barnew. & Ad. 504.

⁶⁰ *Biscoe v. Perkins*, 1 Ves. & B. Ch. Ir. 485.

⁶¹ *Finch v. Winchelsea*, 1 P. Will. Ch. 277; *Copeman v. Gallant*, 1 P. Will. Ch. 314.

⁶² *Cruise*, Dig. t. 12, c. 4, s. 4; 2 Story, Eq. Jur. § 1268, 1269.

⁶³ 2 Story, Eq. Jur. § 1267; *Fonblanque*, Eq. b. 2, c. 7, § 2, and note (c).

⁶⁴ *Walker v. Symons*, 3 Swanst. Ch. 58, 73.

are imposed upon the trustee, he must of course obey those instructions faithfully. He is bound also to perform the incidental obligations which are implied and not expressed.

1915. In general, trustees are responsible only for their own acts and not for the acts of each other, unless they have made some agreement by which they have agreed to be bound for each other, or they have by their own voluntary co-operation or connivance enabled the other to accomplish some known object in violation of their trust.

A joint trustee is not responsible even when he executes jointly with the other a receipt for the purchase money of land, or for the satisfaction of a debt, unless the money has been received by him, though executors are placed upon different grounds.

The difference between joint executors and joint trustees as to their liabilities is this: Trustees have all equal power, interest, and authority, and cannot act separately, as executors may, but must join in conveyances and receipts. One trustee cannot sell without the other, or be entitled to receive more of the consideration money, or be more a trustee than the other. He must, therefore, join in the receipts, and it would be against justice to make him responsible, unless, besides joining in the receipts, he has done some other act, or been in some default or neglect.⁶⁵ Executors on the contrary can act independently of each other, are not compellable to join in a receipt, to discharge the debtor of the estate; when they join, then it must be considered as their voluntary act, and equivalent to an admission of their willingness to be jointly accountable for the money which may have been received by one of them.⁶⁶

1916. When, in consequence of fraud, gross negligence, or wilful departure from their duty, loss has happened or is likely to happen to the trust estate, courts of equity will remove trustees, and substitute new ones, and also supply the places of those who have become incapable of acting.⁶⁷ Indeed, they will exercise this power when the trustees have become enemies to each other and cannot act together, if the estate is likely to sustain a loss.⁶⁸

1917. We will next consider who may be a *cestui que trust*, and his rights.

1918. In general, any person who is capable of taking the legal estate directly and immediately to himself may acquire a beneficial interest in the same estate. A *feme covert*, an infant, and even a person unborn, may be a *cestui que trust*, for in the latter case whenever he comes into existence and capable of taking, his rights will accrue.

1919. The *cestui que trust* is entitled to the whole beneficial interest, and the trustee is considered in equity only as an instrument. It is a rule in equity that no act of the trustee shall be allowed to prejudice the *cestui que trust* and benefit himself. But sometimes some such acts are binding on him, when third persons are concerned; as, for example, when the trustee sells the trust estate as his own to a stranger without notice of the trust.

A *cestui que trust* has the *jus habendi* and the *jus disponendi*, and though at law he has neither the *jus in re* nor the *jus ad rem*, yet in equity he has both.⁶⁹ He is entitled to the pertainance of the profits, and also the possession of the

⁶⁵ 1 Fonblanque, Eq. B. 2, c. 7, § 5; *Fellows v. Mitchell*, 1 P. Will. Ch. 83, and Cox's note; 1 P. Will. Ch. 241, n.

⁶⁶ 1 Fonblanque, Eq. B. 2, c. 7, § 5; *Murrell v. Cox*, 2 Vern. Ch. 570.

⁶⁷ 2 Fonblanque, Eq. B. 2, c. 7, § 1, note (a); *Ellison v. Ellison*, 6 Ves. Ch. 663.

⁶⁸ Comyn, Dig. *Chancery*, 4 W. 7; *Uverdale v. Ettrick*, 2 Chanc. Cas. 130.

⁶⁹ *Smith v. Wheeler*, 1 Mod. 17; *Bacon, Abr. Uses and Trusts (M)*; *Cholmondeley v. Clinton*, 2 Jac. & W. Ch. 148; 2 Washburn, Real Prop. 182; *Price v. Sisson*, 13 N. J. 174.

estate in all cases where he is the only person interested, and the duties of the trustees do not render it necessary for them to retain the possession.⁷⁰

He may convey his interest at his pleasure, as if he were the legal owner, without the technical form essential to pass the legal estate; and an assignment or conveyance of an interest in trust will carry a fee, without words of limitation, when the intent is manifest.⁷¹

Executed trusts are enjoyed with the same advantage to the owner as if they were legal estates, and the *cestui que trust* may consequently dispose of them and devise them exactly as if they were legal estates, without the intervention of the trustee.

1920. The trust estate may be *destroyed* in several ways: by the sale of the estate by the trustee as his own to a stranger for a valuable consideration without notice of the trust; but in this case the trustee is answerable to the *cestui que trust* for the value of the estate; it may be destroyed by merger; as, when the legal and equitable estates being co-extensive and commensurate meet in the same person, the trust or equitable estate is merged in the legal;⁷² as, if the wife have a legal and the husband the equitable estate, and they have an only child to whom both estates descend, and who dies intestate, the two estates having united, the descent will follow the legal estate.⁷³

⁷⁰ See Chanc. Prec. 415; *Elliott v. Armstrong*, 2 Blackf. Ind. 198; *Waggener v. Waggener*, 3 F. Moore, 545; *Miller v. Bingham*, 1 Ired. Eq. No. C. 423; *Starke's Lessee v. Smith*, 5 Ohio, 455.

⁷¹ *Elliott v. Armstrong*, 2 Blackf. Ind. 198.

⁷² In the matter of *Dekay*, 4 Paige, Ch. N. Y. 408; *Nicholson v. Halsey*, 1 Johns. Ch. N. Y. 422.

⁷³ *Goodtitle v. Wells*, Dougl. 741; *Selby v. Alston*, 3 Ves. Ch. 341.

CHAPTER XXV.

POWERS.

- 1921. Definition.
- 1923-1935. Kinds of powers.
- 1924-1930. Powers of revocation and appointment.
 - 1925. Power of appointment.
 - 1929. Power of revocation.
 - 1931. Naked powers and powers coupled with an interest.
 - 1932. Restraining and enabling powers.
- 1933-1935. Collateral and relative powers.
 - 1934. Relative powers.
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- 1936-1940. How powers are created.
 - 1937. By what instrument.
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 - 1939. Objects of valid powers.
 - 1940. Incidents to powers.
- 1941-1951. Execution of powers.
 - 1942. Capacity of the donee.
 - 1944. Mode of execution.
- 1945-1947. Extent of the execution.
 - 1946. When the donee has no interest.
 - 1947. When the donee has an interest.
- 1948-1951. Effect of the execution.
 - 1949. Effect of the instrument of execution.
 - 1951. Effect of estates created as to each other.
 - 1952. Powers of sale in mortgages.

1921. In the preceding chapter we have considered the nature of equitable estates under the heads of uses and trusts. Connected with the subject are powers which will form the object of the present chapter.¹

The word *power* has a very extensive meaning. It is either inherent or derivative. The former is the right, ability, or faculty of doing something without receiving that right, ability, or faculty from another. The people have the power to form a government, or to change one already established; a father has the legal power to chastise his son; a master, his apprentice.

Derivative power is an authority by which one person enables another to do an act for him; as, to sell land, to execute a deed, to make a contract, or to manage a particular business. Powers of this kind were well known to the common law, and were divided into two sorts: naked powers or bare authority, and powers coupled with an interest; there is a material difference between them. In the case of the former, if it be exceeded in the act done, it is entirely

¹ See Powell, Powers; Sugden, Powers; Comyn, Dig. *Poier*; Bacon, Abr. *Uses and Trusts*, (G); Viner, Abr.; 2 Lilly, Abr. 339; 4 Kent, Comm. 316; Cruise, Dig. tit. 32; Crabb, Real Prop. § 1958, *et seq.*

void; in the latter, it is good for so much as is within the power, and void for the rest only.

But the powers which are the subject of this chapter are of another sort; they are derived from the statute of use. A power, in this sense, may be defined to be an authority, enabling a person, through the medium of the statute of uses, to dispose of an interest in land vested either in himself or another person,² or it is an authority to do some act in relation to lands, or the creation of estates therein, or of charges thereon, which the owner, granting or reserving such power, might himself have lawfully performed.

1922. Powers differ from trusts in several particulars. Powers are never imperative; they leave the act to be done at the will of the party to whom they are given; trusts, on the contrary, are always imperative, and binding upon the conscience of the party entrusted.³ Again, where there is a mere power of disposing, and that power is not executed, a court of equity cannot execute it; but when a trust is created and the execution fails by the death of the trustee or by accident, such a court will execute the trust.⁴ But when a power possesses the qualities of a trust it will be considered as a trust.⁵

He who confers the power is called the donor, he who is to execute the power is the donee, and he in whose favor the power is to be executed is the appointee.

In treating of powers we shall consider, first, the different kinds of powers, second, how they are created, and, third, how they are executed.

1923. These powers, when considered in a particular point in view, may be variously classified; as to their authority, they are powers of appointment or of revocation; as regards their extent, they are naked powers or powers with an interest; as to their strength, they are restraining and enabling powers; as they relate to the estate, they are collateral or relative.

1924. In general, a power of appointment includes in it a power of revocation, for when an estate is conveyed to the donee for a certain purpose, with a power of appointment, he has the power to defeat the use before created, and that is a revocation. This power is incident to the power of appointment, although no express power of revocation be reserved in the deed creating it,⁶ unless it appears that an immediate execution of the power once for all was intended.⁷

1925. A *power of appointment* is properly a power to limit to a use, and an appointment in pursuance of a power operates under the statute not directly as a conveyance of the land, but as a substitution of a new use in the place of the former one; indeed, such an appointment is ranked as a species of conveyance.⁸ An appointment, in its most extended sense, being a limitation of uses, is applicable to every power by which property is modified, and includes every species of power which has that effect; as, the powers of leasing, selling, exchanging, or charging, which are usually reserved in settlements. But, in a more restricted sense, the power of appointment is a power by which the donee is enabled to appoint an estate, however large, as distinguished from other powers to give limited or particular estates.

1926. This power of appointment is either general, or limited and qualified.

² Sugden, Pow. 83; Parker v. Clere, F. Moore, 567; Sir E. Clere's case, 6 Coke, 17, b. See 10 Ves. Ch. 265.

³ Shelton v. Homer, 5 Metc. Mass. 462; Wilmot's Opin. 23.

⁴ Brown v. Higgs, 8 Ves. Ch. 570.

⁵ Steel v. Henry, 9 Watts, Penn. 529; Alexander v. McMurray, 8 Watts, Penn. 504.

⁶ Adams v. Adams, Cowp. 651.

⁷ Piper v. Piper, 3 Mylne & K. Ch. 159.

⁸ Scrafton v. Quincy, 2 Ves. Ch. 413.

A *general* power of appointment is that which authorizes the donee to appoint any person he may think proper; it is a species of ownership.⁹ But the donee is not considered the owner when, on the default of the exercise of this power, there is a limitation over.¹⁰

When the power is general for such uses as the donee shall appoint without any limitation over, this gives him such dominion over the estate that he may appoint himself or any other person, and liberate the estate entirely from every species of limitation inconsistent with the fee.¹¹

A *particular* or qualified power of appointment, unlike a general power, only enables the party to appoint among a particular description of objects; as, a power to appoint among a man's own children or the children of another.

1927. The *execution* of the power of appointment must be made in such a manner as to come within the spirit of the authority given. And although at law the rule only requires that some allotment, however small, shall be given to each person when a class is mentioned as being the objects of the power, the rule in equity differs, and requires a real or substantial portion to each, and a mere nominal appointment is deemed illusory and fraudulent. When the distribution is left to the discretion of the donee or appointer without any prescribed rule to such children as he may choose he may appoint one only;¹² but if the words are among the children as he shall think proper, each must have a share, and the doctrine of illusory appointments applies.¹³

1928. When there has been a complete execution of a power, and something, *ex abundanti*, added, which is improper, the execution is good, and only the excess is void; but it would be otherwise if there had not been a complete execution of the power, or where the boundary between the excess and execution is not distinguishable; thus, where there was a legacy given to the testator's granddaughter A of £4000, with power to bequeath the same to the testator's grandchildren as she pleased, but to no other person, and, in default of such appointment, the testator gave the money among the grandchildren generally; and A, by her will, reciting the power, and in execution thereof bequeathed the £4000 to B, a grandchild of the testator, with a request to give a specified part of it to persons not grandchildren, and on her failure to do so bequeathed it over to another grandchild with a similar request, the appointment to B was held to be absolute for the whole sum, being a complete execution of the power, and that the condition was void.¹⁴

1929. At common law, *powers of revocation* in deeds were unknown; they sprang up after the statute of uses, from which they derive their effect. This power, as before observed, is included in the power of appointment, unless under special circumstances.

A power of revocation is incident to some instruments, and to others not. In general, when a naked authority is given in the instrument, as, a letter of attorney and the like, the power is revocable; for a man cannot by any words make a mere warrant or authority irrevocable.¹⁵

In an instrument creating an interest in land, a distinction must be observed between a deed and a will. When a power is once executed by deed, there being no power reserved by that deed to revoke or alter it, a subsequent limita-

⁹ Butler, Co. Litt. 271, b. n.

¹⁰ Boyce v. Walter, 9 Dan. Ky. 482.

¹¹ Halsey v. Hales, 7 Term, 194; Throughton v. Throughton, 3 Atk. Ch. 656. See Bentham v. Smith, Cheves, Eq. So. C. 33; Haslin v. Kean, 2 Tayl. No. C. 279; Flintham's Appeal, 11 Serg. & R. Penn. 16.

¹² Kemp v. Kemp, 5 Ves. Ch. 857.

¹³ Vanderzee v. Acloft, 4 Ves. Ch. 771; 2 Vern. Ch. 513; Sugden, Pow. 488.

¹⁴ Warner v. Howell, 3 Wash. C. C. 12.

¹⁵ Vignior's case, 8 Coke, 82, a.

tion by another deed will be void, for the rule is that the first deed and the last will shall operate; till his death the testator has a right to change or alter his will and revoke all the powers he has given.¹⁶

1930. Revocations of power may be express or implied.

When the power of revocation is created by *express* words, no particular form is requisite; for if the intention be clear, the expression will be construed so as to support the intention.¹⁷

Implied revocations of powers are those which arise by operation of law from the acts of the parties. When the donee of a power does an act of a nature irreconcilable with the existence of a former use, as, for example, when a man having power to revoke limits new and other uses, the limitation of such other uses being inconsistent, will be construed a revocation, although the deed creating the power be not recited.¹⁸ And where the power of revocation is reserved, a devise of the estate inconsistent with the deed will also operate as a revocation.¹⁹

1931. As regards their extent, powers are either *naked* or *coupled with an interest*.

The distinction between a naked power and a power coupled with an interest depends upon the question whether the power is collateral to or flows from the interest; for if it be of the former kind, then the two are as unconnected as if they were vested in different persons,²⁰ therefore, although both an interest and a power pass to a married woman, yet, if the power is collateral to the interest, it is then a naked power and may be executed by her.²¹

A power coupled with an interest must give the donee a present interest or a future one in the land; for where the power is so annexed to the estate that its execution must operate upon it, it is properly a power coupled with an interest. The estate on which the power acts must be in the donee, so that he acts in his own name; if the estate has never passed to him, he must act in the name of the party giving the power in whom the estate is vested, and to be valid it must be such an act as would be valid if executed by the donor; it is, therefore, revocable at his death.²² An instance of a power coupled with an interest may be mentioned as the case of a mortgagee, which is not revocable by the death of the mortgagor.²³ A beneficial interest is not, however, required to create a power coupled with an interest; the estate of a trustee, executor, or guardian, is sufficient for that purpose.²⁴

A naked power is distinguished from one coupled with an interest in this respect, that it never survives; and, therefore, if a naked power is given to two to sell and one dies, it cannot be executed by the survivor; but it is otherwise where there is a power coupled with an interest, as in the case of trustees.²⁵

1932. When the donor of the power, who is the owner of the estate, imposes certain restrictions by the terms of the powers, these restrictions are called *restraining powers*. *Enabling powers* are those which confer upon persons not

¹⁶ *Hatcher v. Curtis*, 2 Freem. 61.

¹⁷ *Coke*, Litt. 237, a; *Oxon (Bp.) v. Leighton*, 2 Vern. Ch. 376.

¹⁸ 2 Rolle, Abr. 263; *Scrope's Case*, 10 Coke, 143.

¹⁹ *Guy v. Dormer*, T. Raym. 295.

²⁰ *Hess v. Hess*, 5 Watts, Penn. 187; *Mansfield v. Mansfield*, 6 Conn. 559; 4 Whart. Penn. 27; 7 Watts, Penn. 386; 2 Rawle, Penn. 420.

²¹ *Godolphin v. Godolphin*, 1 Ves. Sen. Ch. 21. See *Jackson v. Davenport*, 18 Johns. Ch. N. Y. 295.

²² *Hunt v. Rousmaniere*, 7 Wheat. 204.

²³ *Bergen v. Bennett*, 1 Caines, Cas. N. Y. 1.

²⁴ 1 Caines, Cas. N. Y. 16.

²⁵ *Bowyer v. Judge*, 11 East, 288. As to the power of executors to sell when one of them dies, see *Sugden*, Powers, 162, 167.

seised of the fee the right of creating interests, to take effect out of it, which could not be done by the donee of the power unless by such authority.

1833. Powers are divided into two great divisions, namely, those which relate to the land, and those which are collateral to it. The former are called *relative powers*, and the latter *collateral powers*.

1834. Powers relating to the land are those given to some persons having an interest in it, over which they are exercised. These again are subdivided into powers appendant and in gross.

A *power appendant* is when a person has an estate in land, with a power of revocation and appointment, the execution of which falls within the compass of his estate; as, when a tenant for life has a power of making leases in possession.

A *power in gross* is where a person has an estate in the land with a power of appointment, the execution of which falls out of the compass of his estate, but notwithstanding is annexed in privity to it and takes effect in the appointee, out of an interest appointed in the appointer; for instance, where a tenant has power of creating an estate to commence after the determination of his own, such as to settle a jointure on his wife, or to create a term of years to commence after his death; these are called powers in gross, because the estate of the person to whom they are given will not be affected by the execution of them.

1835. *Collateral powers* are those which are given to mere strangers who have no interest in the land; as, where *cestui que vie* devises that his feoffees shall sell his land, here the power to sell is merely collateral to the power in the land, for the feoffee takes no interest in the land itself, but is barely empowered to sell and dispose of an interest out of the land.

1836. In order to *create* powers there must be a proper instrument, sufficient words, and a proper object; these will be considered in three divisions, and in the fourth will be examined the incidents of a power.

1837. A power may be created by deed, either in the body or by indorsement on it before execution, or by a deed of settlement, and there need be no counterpart of the deed.²⁶ It may also be created by devise. All that is required is, that the intention be properly declared, for the creation, execution, and destruction of powers all depend upon the intention of the parties.

1838. No precise form of words is requisite to create or reserve a power, any words signifying the intent will be sufficient;²⁷ nor is it material in what part of the instrument the power is inserted;²⁸ even a recital or preamble of a deed may operate as a good reservation of a power.²⁹

1839. A power may be reserved to revoke the whole settlement, or even a particular limitation in the settlement, leaving the other limitations unaffected. A power may also be reserved to raise concurrent interests for different purposes; as, powers to a tenant for life to grant a jointure to his wife, and to create a term to commence from his death, for securing younger children's portions; in which case during the continuance of the jointure, the term will not take effect in point of interest, but shall go on in time, and the residue of the term remaining unexpired after the death of the jointress shall take effect in interest, and no more.³⁰

No power to create a perpetuity is valid.³¹

1940. It is a rule that a power cannot be delegated by the donee to another, whether the power relates to the land or is collateral to it, for it is a maxim

²⁶ *Fitz v. Smallbrook*, 1 Kebl. 134. See *Griffin v. Stanhope*, Croke, Jac. 456.

²⁷ *Anon.* F. Moore, 608.

²⁸ *Rex v. Eatington*, 4 Term, 177.

²⁹ *Fitzgerald v. Fauconberge*, Fitzg. 207.

³⁰ *Edwards v. Slater*, Hardr. 410.

³¹ *Spencer v. Marlborough*, 5 Brown, Parl. Cas. 592; 1 Ed. Ch. 404.

that *delegatus non potest delegare*.³² But this must be understood where there is no authority to delegate the power; for where there is an express authority given, even a naked power may be delegated.³³

1941. In treating of the execution of powers we shall consider, first, the capacity of the donee, second, the mode of execution, third, the extent of the execution, and, fourth, its effect.

1942. Every person lawfully capable of disposing of an estate actually vested in himself may exercise a power over land, or direct a conveyance of that land.

In general, an infant or a married woman may execute a purely naked power, and, in the latter case, without the consent of her husband, whether the power was given to her before she was married or since. But if the power be given to her to be executed "being sole," she cannot execute it during coverture. And even one found by inquest to be a habitual drunkard may execute a power.³⁴

1943. A naked authority given to several persons does not survive; accordingly, by the common law, when a testator by his will directed his executors, by name, to sell, and one of them died, the others could not sell, because the words of the testator could not be satisfied.³⁵ The statute of 21 Henry VIII, c. 4, gave the power to those executors who accepted the trust to sell, though one or more of the others should refuse to act. The principles of this statute have been re-enacted or adopted generally in this country.³⁶

1944. A power must be executed according to the requirements of the instrument creating it. It may be by deed only, or by will, or in the alternative by will or by writing. When the power must be executed by deed, it cannot be executed by will, except where equity interposes to aid a defective execution of a power.³⁷ When the power given is to be executed by will, it cannot be by an act *inter vivos*.³⁸

Although a power must be executed according to the provisions of the instrument creating it, yet, if something be done beyond the requirements of the instrument, it will not invalidate the execution if the power has been properly executed, and the excess will be rejected.³⁹

On the other hand, if less is done than the power authorizes, it may sometimes be good; as, where the power was to sell the estate it was held a sufficient authority to mortgage.⁴⁰

1945. The extent of the execution of powers is different in cases where the donee of the power has no interest in the estate and the power is not referred to, and in cases where the donor has an interest in the estate.

1946. When the donee has *no interest* in the estate and has a power to limit uses, but no power to convey the land, and conveys or devises the land generally, and the circumstances required to the execution of the power as to sub-

³² *Parker v. Kett*, 1 Salk. 96; *Withers v. Yeadow*, Rich. Eq. So. C. 324; *Shankland v. The Corporation*, 5 Pet. 395.

³³ *Palliser v. Ord*, Bunb. Exch. 166.

³⁴ *Still v. McKnight*, 7 Watts & S. Penn. 244. See Sugden, Powers, c. 3.

³⁵ *Peter v. Beverly*, 10 Pet. 533; *Osgood v. Franklin*, 2 Johns. Ch. N. Y. 19; Coke, Litt. 112.

³⁶ *Zeback v. Smith*, 3 Binn. Penn. 69; *Hunt v. Ferris*, 15 Johns. N. Y. 346.

³⁷ *Harker v. Harker*, 3 Harr. Del. 650; *Darlington v. Pultney*, Cowp. 260; *Follet v. Follett*, 2 P. Will. Ch. 489.

³⁸ *Williamson v. Beckham*, 8 Leigh, Va. 20; *Knight v. Yarboro*, Gilm. Va. 32; *Bentham v. Smith*, Cheves Eq. So. C. 33; *Morris v. Owen*, 2 Call, Va. 520; *Reid v. Shergold*, 10 Ves. Ch. 370.

³⁹ *Warner v. Howell*, 3 Wash. C. C. 12.

⁴⁰ *Lancaster v. Dolan*, 1 Rawle, Penn. 248.

scription, witnesses, etc., are observed, the conveyance or devise shall inure as a limitation of the use, because otherwise it would be void.⁴¹ And for the same reason, where a man having several powers, but no estates actually vested in him, makes a general disposition which can only take effect as an execution of at least one of the powers, it shall be deemed an execution of all the powers.⁴²

Where there has been a particular disposition of an estate, it will be deemed to be in exercise of such of the powers as authorize the act.⁴³ On the same principle, where a man has a power of revocation, and does an act which can operate only as an exercise of it, and all the incidental circumstances prescribed by the proviso are observed, the act shall be deemed an execution of the power, although no reference whatever is made to it.

But although a power may be executed without reciting it, or taking the slightest notice of it, yet the donee must mention the estate or interest he intends to dispose of.

When a man having several powers refers to some and executes them formally, that is an argument against any other being executed by general comprehensive words in the same instrument.⁴⁴ But when the intention of a party to execute his power can be collected from other circumstances, it will be sufficient to the power.⁴⁵

1947. When a man has a power and an *interest*, and does an act generally as owner of the land without reference to his power, the land shall pass by virtue of his ownership. Having a grantable estate and also a power to limit to use, when he grants the land itself without reference to his authority, it implies his intent to grant an estate as owner of the land, and not to limit a use in pursuance of his power.

Whether the act shall be considered as an execution of a power or a conveyance of an estate depends upon the intention of the party. For example, where a man having several powers over different estates and also interests in them recites the power over one estate and executes it in a formal manner, and then recites, not that he has a power to appoint the other estate, but that he is seised of it in fee, and accordingly conveys his interest in it by lease and release, the latter estate will be held to pass out of his interest, and not by force of his power, simply on the apparent intention not to execute the power.⁴⁶

1948. The effect of the execution of powers is to be considered, first, in regard to the operation of the instrument executing the power, and, second, in regard to the manner in which the estates created take effect in regard to each other.

1949. The power may be exercised in a variety of modes, namely, by an act *inter vivos*, as a grant, bargain and sale, lease and release, covenant to stand seised, or feoffment, or by a will. In every case the instrument operates strictly as an appointment or declaration of use; and as a use cannot be limited upon a use, the grantee, etc., takes the legal estate, the appointment being made to him; and if any ulterior use is declared, it operates merely as a trust in equity.

1950. But a distinction must be made between the effect of a deed and of a will. A will not only operates as an execution of the power, but also in most respects partakes of the quality of a proper will. When a power of revocation is not reserved in a deed executing the power, the instrument is irrevocable;

⁴¹ 6 Coke, 17; F. Moore, 476; Croke, Eliz. 877; Croke, Jac. 81.

⁴² Roscommon v. Fowke, 4 Brown, Parl. Cas. 523; Allison v. Kurtz, 2 Watts, Penn. 188.

⁴³ Fitzgerald v. Fauconberge, Fitzg. 207.

⁴⁴ Attorney General v. Vigor, 8 Ves. Ch. 256. See Allison v. Kurtz, 2 Watts, Penn. 188.

⁴⁵ Bennet v. Aburrow, 8 Ves. Ch. 616; Bradish v. Gibbs, 3 Johns. Ch. N. Y. 551. See Robbins v. Bellas, 4 Watts, Penn. 256.

⁴⁶ See Maundrell v. Maundrell, 7 Ves. Ch. 567; 10 Ves. Ch. 246; Hay v. Mayer, 8 Watts, Penn. 209.

but this does not hold good as to a will, for although in truth it is not strictly a will, but simply a declaration of use, yet it so far retains the properties of a will as to be ambulatory till the death of the testator, and consequently revocable without any express power reserved for the purpose,⁴⁷ it being a rule that the first deed and the last shall have effect.

1951. In general, estates created by the execution of a power take effect precisely in the same manner as if created by the deed which raised the power; it is not by the deed or will of the appointer that the appointee acquires a title, but by virtue of the deed creating the power.⁴⁸ For this reason, although a husband cannot at common law convey directly to his wife, yet he may make an immediate appointment to her.⁴⁹ But the rule that the estate under the power takes effect under the deed creating the power applies only to certain purposes, and as between the parties it cannot impair the intervening rights of strangers to the power.⁵⁰

1952. Somewhat analogous to powers, and in fact included in powers in their broader significance, are *powers of sale* incorporated in mortgages, and authorizing a sale of the mortgaged property in case of a default in the performance of the conditions of the mortgage. Such powers, when executed, convey an estate to the purchaser.⁵¹ Such a power is a power coupled with an interest, is said to pass by assignment of the debt,⁵² and survives the death of the mortgagor as a general rule,⁵³ and is irrevocable.⁵⁴ In executing the power the terms must be exactly complied with,⁵⁵ and statutory requirements must also be obeyed.⁵⁶

The mortgagee in executing the power acts as a trustee for the mortgagor;⁵⁷ in the absence of agreement or statutory provisions he cannot become a purchaser,⁵⁸ and will hold any surplus after paying the debt for the benefit of the debtor.⁵⁹ Such a power does not affect the mortgagor's right to redeem so long as it remains unexecuted.⁶⁰

⁴⁷ *Hatcher v. Curtis*, 2 Freem. 61.

⁴⁸ *Roach v. Wadham*, 6 East, 289.

⁴⁹ See *Latch*, 44; 2 Wils. 402.

⁵⁰ *Marlborough v. Godolphin*, 2 Ves. Ch. 78; *Southby v. Stonehouse*, 2 Ves. Ch. 610. See *Jackson v. Davenport*, 20 Johns. N. Y. 537, 550.

⁵¹ *Bloom v. Rensselaer*, 15 Ill. 503; *Smith v. Provin*, 4 All. Mass. 518; *Mitchell v. Bogan*, 11 Rich. So. C. 686; *Walthall v. Rives*, 34 Ala. n. s. 91; *Fanning v. Kerr*, 7 Iowa, 462; *Wilson v. Troup*, 7 Johns. Ch. N. Y. 25; *Taylor v. Chowning*, 3 Leigh, Va. 654.

⁵² 1 *Washburn*, Real Prop. 499; *Slee v. Manhattan Co.* 1 Paige, Ch. N. Y. 48.

⁵³ *Hunt v. Rousmaniere*, 8 Wheat. 174; *Hannah v. Carrington*, 18 Ark. 104; *Bonney v. Smith*, 17 Ill. 533; *Jeffersonville v. Fisher*, 7 Ind. 699; *Robertson v. Gaines*, 2 Humphr. Tenn. 307. But see *Robertson v. Paul*, 16 Tex. 472; *Fanning v. Kerr*, 7 Iowa, 450.

⁵⁴ *Bradley v. Chester R. Co.* 36 Penn. St. 151; *Brisbane v. Stoughton*, 17 Ohio, 488.

⁵⁵ *Roarty v. Mitchell*, 7 Gray, Mass. 243; *Bradley v. Chester R. Co.* 36 Penn. St. 151; *Cooper v. Crosby*, 8 Ill. 508.

⁵⁶ *Lawrence v. Farmers' Co.* 13 N. Y. 200.

⁵⁷ *Jenkins v. Jones*, 2 Giff. Ch. 108; *Howard v. Ames*, 3 Metc. Mass. 811.

⁵⁸ *Middlesex Bank v. Minot*, 4 Metc. Mass. 325; *Hyndman v. Hyndman*, 19 Vt. 9; *Dobson v. Racey*, 3 Sandf. Ch. N. Y. 60. See *Ramsey v. Merriam*, 6 Minn. 168; *Blockley v. Fowler*, 21 Cal. 329; *Michoud v. Girod*, 4 How. 553; *Robertson v. Norris*, 1 Giff. Ch. 421; *Howards v. Davis*, 6 Tex. 174.

⁵⁹ *Wright v. Rose*, 2 Sim. & S. Ch. 323.

⁶⁰ *Turner v. Burchell*, 3 Harr. & J. Md. 99; *Benham v. Rowe*, 2 Cal. 387; *Eaton v. Whiting*, 3 Pick. Mass. 484; *Carradine v. O'Connor*, 21 Ala. n. s. 573; *Walton v. Cody*, 1 Wisc. 420.

CHAPTER XXVI.

TITLE TO REAL ESTATE BY ACT OF LAW.

- 1953. Title to real estate, what it is.
- 1954. Titles, how considered in law and equity.
- 1955. Title, how acquired.
- 1956-1986. Title by descent.
- 1957. Who may be the heir.
- 1959-1968. Consanguinity.
- 1962. Direct lineal kindred.
- 1963. Collateral kindred.
- 1969. Affinity.
- 1970. What estate descends.
- 1971-1986. Rules of the law of descent.
- 1972. Rules in relation to the descending line.
- 1977. Rules in relation to the ascending line.
- 1979. Rules in relation to the collateral line.
- 1987. Escheats.
- 1988-1992. Forfeiture.
- 1989. Forfeiture for crimes.
- 1990. Forfeiture by alienation.
- 1991. Forfeiture by breach of conditions.
- 1992. Forfeiture for waste.
- 1993. Merger.

1953. *The title to things real* will next be the subject of our inquiries. Title is defined by Sir Edward Coke¹ to be the means whereby the owner of lands hath a just possession of his property: *Titulus est justa causa possidendi id quod nostrum est.*

1954. Titles are viewed differently at law from what they are in equity.

At law there are several qualities requisite to form a complete title to lands and tenements. The lowest and most imperfect degree of title is the mere possession or actual occupation of the estate, without any apparent right to hold or continue such possession; this happens when one man disseises another.² The next step to a good and perfect title is the right of possession, which may reside in one man, while the actual possession is not in himself, but another. This right of possession is of two sorts: an apparent right of possession, which may be defeated by proving a better; and an actual right of possession, which will stand the test against all opponents. The mere right of property, the *jus proprietatis*, may be vested in a man without either possession or right of possession.

To make a complete title the party must have the right of possession joined to the right of property, which is denominated a double right, *jus duplicatum*, or *droit droit*.

In equity a title is either good, marketable, doubtful, or bad.

¹ Coke, Litt. 345.

² 2 Sharswood, Blackst. Comm. 195.

A *good title* is that which entitles a man by right to a property or estate, and to the lawful possession of the same.

A *marketable title* is one which a court of equity considers to be so clear that it will enforce its acceptance by a purchaser. The ordinary acceptation of the term marketable title would convey but a very imperfect notion of its legal and technical import.

To common apprehensions, unfettered by the technical and conventional distinction of lawyers, all titles being either good or bad, the former would be considered marketable and the latter unmarketable. But this is not the way they are regarded in courts of equity, the distinction taken there being not between a title which is absolutely good or absolutely bad, but between a title which the court considers to be so clear that it will enforce its acceptance by a purchaser, and one which the court will not go so far as to declare a bad title, but only that it is subject to so much doubt that a purchaser ought not to be compelled to accept it.³ In short, whatever may be the opinion of the court as to the goodness of the title, yet if there be a reasonable doubt either as to a matter of law or fact involved in it, a purchaser will not be compelled to complete his contract, or to accept of such title. And although such a title may be perfectly secure and unimpeachable as a holding title, it is said in the current language of the day to be unmarketable.⁴

The doctrine of marketable titles is purely equitable and of modern origin.⁵ At law every title not bad is marketable.⁶

A *doubtful title* is one which a court of equity does not consider to be so clear that it will enforce its acceptance by a purchaser, nor so defective as to declare it a bad title, but only subject to so much doubt that a purchaser ought not to be compelled to accept it.⁷ At common law doubtful titles are unknown; there every title must be good or bad, as has been already observed.

A *bad title* is one which conveys no property to the purchaser of an estate. This, of course, will not be sufficient to entitle a seller to a specific performance of the contract, or to damages for the breach of it.

1955. Title to real estate may be *acquired* in several ways. Blackstone reduces them to two, namely, by descent, when the title is vested in a man by operation of law; as, where a person seised of real estate dies, the estate descends to his heirs, who thereby acquire a title; and by purchase, where the title is vested in him by his own agreement, which accordingly includes not only a buying, but a devise, a gift, and a grant, for in each of these cases the devisee, the donee, and the grantee must do something to complete his title, namely, to accept the devise, gift, or grant.

This division of the manner of acquiring title to real estate does not appear to be entirely correct; the title gained by escheat, forfeiture, and merger is acquired by act of law as well as title by descent. A more natural classification would be by considering, first, when the title to estates is acquired by act of law; secondly, when by acts of the parties.

Among the first would be classed descent, escheat, forfeiture, merger; under the second class, alienation, devise, occupancy, prescription, and custom.

1956. *Title by descent*, or hereditary succession, is the title by which a person on the death of his ancestor acquires the estate of the latter as his heir at law. The person who acquires title to the estate is called the heir, and the estate is denominated the inheritance.

³ *Burnell v. Brown*, 1 Jac. & W. Ch. 168.

⁴ *Atkinson*, Mark. Tit. 2.

⁵ *Atkinson*, Mark. Tit. 26.

⁶ *Romilly v. James*, 6 Taunt. 263; *Maberly v. Robins*, 5 Taunt. 625; 1 Marsh. 258; see *Dalzell v. Crawford*, 1 Penn. Law Journ. 17.

⁷ 1 Jac. & W. Ch. 568; 9 Cow. N. Y. 344.

It will be proper to consider who may be the heir; the nature of consanguinity and affinity; the estates which descend; and the rules of the law of descent.

1957. An heir is one born in lawful matrimony, who succeeds by descent, right of blood, and by act of God, to lands, tenements, and hereditaments, being an estate of inheritance. Under the word heirs are included the heirs of heirs *in infinitum*.⁸ According to many authorities, heir, in the singular number, may be *nomen collectivum*, as well in a deed as in a will, and operate in both in the same manner as heirs in the plural number.⁹ In wills, in order to effectuate the intention of the testator, the word heirs is sometimes construed to mean next of kin¹⁰ and children,¹¹ but this is not its true technical meaning.

All free persons, even minors, lunatics, persons of insane mind, and the like, may transmit their estates as intestates, *ab intestato*, and inherit from others.

The child in its mother's womb is considered as born for all purposes for its own interest; it takes by descent since its conception, provided it be capable of inheriting at the moment of its birth. Nevertheless, if the child conceived be reputed born, it is only in the hope of its birth; it is necessary that the child should be born alive, for it is presumed when it is dead born that it never had life. This is the doctrine of the Roman as well as of the common law.¹² *Non nasci, et natum mori, pari sunt. Mortuus exitus non est exitus*.¹³ A person cannot claim an inheritance, therefore, through a child who was conceived, but was dead born. The doctrine laid down by Chancellor Kent,¹⁴ that "for all beneficial purposes of heirship a child *in ventre sa mere* is considered as absolutely born," must be confined to those children afterward born alive, and probably the learned author so meant to be understood.

By the common law monsters are incapable of inheriting; but, although deformed, if they have human shape, they may be heirs.

Our definition of heir shows that the child must be born in lawful matrimony; bastards therefore, have no inheritable blood in them by the common law, but in several states by statutory provision they may inherit when acknowledged by their parents, for then they are considered as legitimate.

1958. Before leaving this subject it is proper to notice a difference in the meaning of the word heir as it is understood by the common and by the civil law. By the Roman law the term heirs was applied to all persons who were called to the succession, whether as devisees or by operation of law. The person who was created universal successor by a will was called the testamentary heir, and the next of kin by blood was, in cases of intestacy, called the heir at law or the heir by intestacy. The executor of the common law is, in many respects, not dissimilar to the testamentary heir of the civil law. Again, the administrator in many respects corresponds with the heir by intestacy. By the common law executors, unless expressly authorized by the will, and administrators have no right except to the personal estate of the deceased; whereas the heir of the civil law was authorized to administer both the personal and real estate.¹⁵

1959. On the death of the ancestor land descends to his kindred; we must therefore commence by ascertaining who are the kindred.

Consanguinity or *kindred* is the relationship of individuals by blood, the

⁸ Coke, Litt. 7, b, 9, a, 237, b; Wood, Inst. 69.

⁹ 1 Rolle, Abr. 253; 10 Viner, Abr. 233. But see 2 Preston, Estates, 9.

¹⁰ *Horseman v. Abbey*, Jac. & W. Ch. 388.

¹¹ Ambl. Ch. 273.

¹² Dig. 50, 16, 129.

¹³ Coke, Litt. 29, b. See 2 Paige, Ch. N. Y. 35; Domat, liv. prélim. t. 2, s. 1, n. 4, 6.

¹⁴ 4 Kent, Comm. 412, 4th ed.

¹⁵ 1 Brown, Civ. Law, 344; Story, Conf. of Laws, § 508.

same as parentage. The word parentage is derived from the word *parere pario*, to beget, to produce; *parens*, he who begets. Thus in its origin the word parent signified the father and mother and other ascendants; it is the correlative of children, *parentes et liberi*. By the technical phrase, next of kin, is understood the relations of a party who has died intestate, who take his estate under the statutes of distribution.

1960. The ancient Romans had words to designate each of the ascendants and descendants to the sixth degree, after which they called all the ascendants by the generic word *maiores*, which we denominate as ancestors, a word derived from *antecessores*; they called all the descendants below the sixth degree *posteriores*, which we have rendered into posterity.

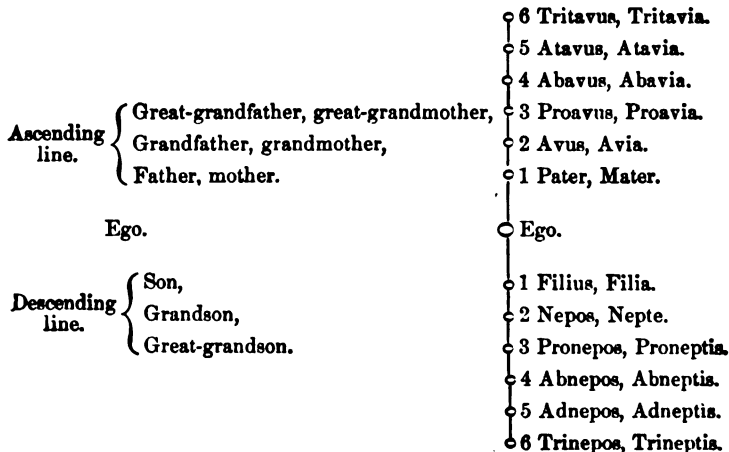
Kindred or parentage consists in being descended from the same author, from a common stock or root, whence spring all the branches of kindred, all the individuals who are united by the ties of blood or of parentage, which has been defined *vinculum personarum ab eodem stipite descenditum*.

1961. Nature has divided the kindred of every one into three principal classes: his children and their descendants; his father and mother and other ascendants; his collateral relations, which include, in the first place, his brothers and sisters and their descendants; and, secondly, his uncles, cousins, and other relations of either sex, who have not descended from a brother or sister of the deceased.

Husband and wife are not, therefore, next of kin, or kindred of each other.

Ascendants and descendants are *lineal* kindred; other relations fall into the, *collateral* line. These two lines will be treated of under two heads.

1962. *Line* is the series of persons who have descended from a common ancestor, placed one under the other in the order of their birth. It connects successively all the relations by blood to each other. The following paradigm, in which the different terms which were given by the Romans to the six degrees of ascendants and descendants are mentioned, will make this manifest:



This line points out the generation; that is to say, that the inferior person is the issue of the superior. Each generation lengthens the line and adds one degree to it; these degrees are nothing but the number of generations pointed out by small perpendicular lines which unite the little circles representing the persons born. The word degree is a metaphorical expression borrowed from the steps of a ladder or of stairs; the kindred descending from their common an-

cestor, from generation to generation, are as so many steps in a stairs or so many rounds in a ladder.

The degree of kindred is established by the number of generations.

In the direct line, of which we now speak, any one of the persons there represented may be taken as a *propositus*, in order to class the other persons in the line, both above and below. This line is then severed into two, namely, the ascending line and the descending line.

Although there is but one ascending and one descending line, which we have seen forms but one, namely, the direct line, ascending from children to the fathers, and descending from the fathers to the children, each of these two sorts of ascendants and descendants has, under another point of view, several other lines, which must be distinguished.

When it is only necessary to count the degrees of father and son between an ascendant and a descendant, it is sufficient to consider only one line of paternal ascendants and descendants. But when we wish to distinguish the paternal and maternal descendants of the same person and the descendants of his sons and daughters, we must then have several lines.

In pursuing all the ascendants of a person, we find a line which ascends to his father, his grandfather, his great-grandfather, and so on from father to father; this is called the paternal line.

Another line, which ascends from the same person to his mother, to his grandmother, and so from mother to mother; this is called the maternal line.

The number of ascendants doubles at each degree. Each person has two ascendants at the first degree, four at the second, eight at the third. Thus, in pursuing up the line of ascendants of each person, we go by diverse lines which fork at each generation. By this progress we find sixteen ascendants at the fourth degree, thirty-two at the fifth, sixty-four at the sixth, one hundred and twenty-eight at the seventh, and so on; at the twenty-fifth generation, this arithmetical progression makes the number of ascendants of an individual thirty-three millions five hundred and fifty-four thousand four hundred and thirty-two.

But as many of the ascendants of a person are descended from the same ancestors, the lines which were forked are again joined to the first common ancestors whence the others descend; and this multiplication, frequently interrupted by the common ascendants, may cease or be reduced to a few persons.

There is this difference between the ascending and descending lines, that in the former they are always the same, every man having a father and mother, two grandfathers and two grandmothers, and so on, although the number of ascendants may become unequal for the reasons just mentioned.

With regard to the descending lines, they fork differently, according to the number of descendants; they last a greater or a shorter time as the generations cease or continue. Many families become extinguished for want of descendants; others will last to the end of time. Thus the lines of descendants are diversified in different families.

1963. *Collateral consanguinity* or kindred is the relationship existing among persons who descend from the same common ancestor, but not from each other.

Two persons may descend from the same father and mother, from the same grandfather and the same grandmother, and thus in ascending the line to the great-grandfather and great-grandmother, and other ancestors. Then the tie of blood or kindred which unites them is double; that is, there is a double tie, that on the side of the father and that on the side of the mother. In this case the parties are of the whole blood.¹⁶

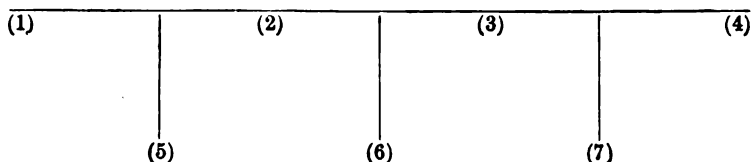
¹⁶ Among the civilians, sons who are the issue of the same father and the same mother

But it is possible that these persons may be descended from the same father, grandfather, etc., but from different mothers or grandmothers; or, on the contrary, from the same mother or grandmother, but from different fathers or grandfathers, as it happens when a man or a woman contracts successively two or more marriages, and that children are born from each, then relationship or kindred exists among the children only on one side, either on the side of the father or of the mother. The kindred between the parties is that of half blood. For example, if Primus marry Prima and has by her two sons, they are of the whole blood; but if, after Prima's death, Primus marry Secunda and has by her a son, the sons of the first marriage and that by the second are of the half blood.

1964. By the civil law persons born of the same father, grandfather, etc., but of different mothers, are called consanguineous children. Those born of the same mother, or grandmother, etc., but of different fathers, are called uterine children. In the common law there is no such distinction in the names; they are children of the half blood.

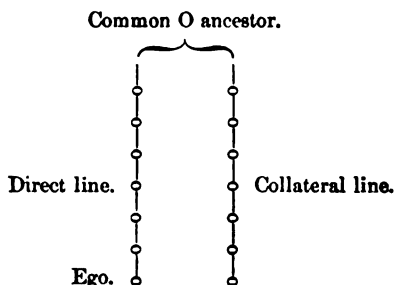
Sometimes it happens in these two cases that the brother of my brother is not of kin to me; for example, I have a consanguineous brother, that is, one born of the same father with myself, but of another mother. This brother has himself a uterine brother, the issue of his mother, but by another than our common father; this brother of my brother is not of kin to me.

This will appear clear by the following paradigm: There (1) represents my mother; (2) my father; (3) my father's second wife; (4) the second husband of my father's second wife; (5) myself; (6) my consanguineous brother; (7) my consanguineous brother's uterine brother.



1965. The collateral line, considered of itself and relatively to the common ancestor, is a direct line; it takes the name of collateral when it is placed along side of another line below the common ancestor, in whom both lines unite.

The following is an example:



These two lines are independent of each other; they have no connection

are called brothers-german. The word *german*, *germanus*, signifies in matters of descent, whole or entire, and it is applied not only to brothers, or sisters, but to cousins, hence the expression cousins-german.

except by uniting in the person of the common ancestor, and it is this union which forms the kindred between the persons in these two lines.¹⁷

1966. There are two modes of computing degrees of collateral consanguinity, the one by the canon law, which has been adopted by the English common law, and the other by the civil law.

The mode of computation by the canon and English common law is to begin with the common ancestor and to reckon downward, and the degree in which the two persons, or the more remote of them, is distant from the ancestor, is the degree of kindred subsisting between them; for instance, two brothers are related to each other in the first degree, because from the father to each of them is one degree. An uncle and a nephew are related to each other in the second degree, because the nephew is two degrees distant from the common ancestor, and this rule of computation is extended to the remotest degree of collateral relationship.

The method of computing by the civil law is to begin at either of the persons in question and count up to and including the common ancestor, and then downward to the other person, calling it a degree for each person, both ascending and descending, and the number of degrees they stand from each other is the degree in which they stand related. Thus, from the nephew to his father is one degree, to the grandfather two degrees, and then to the uncle three, which points out the relationship. In computing the degrees of consanguinity, the civil law is generally followed in this country, except in North Carolina, where the rules of the canon or common law of England in relation to descents are adopted to ascertain the degrees of consanguinity.¹⁸

The mode adopted by the civil law is preferable, for it points out the actual degree of kindred in all cases; by the mode adopted by the common law different relations may stand in the same degree. The uncle and nephew stand related in the same degree by the common law, and so are two first cousins, or two sons of two brothers; but by the civil law the uncle and nephew are in the third degree and the cousins are in the fourth. The mode of computation, however, is immaterial, for both will establish the same person to be the heir.

1967. The table on the following page, in which the Roman numeral letters express the degrees by the civil law and the Arabic figures at the bottom the degrees by the common law, will fully illustrate the subject.

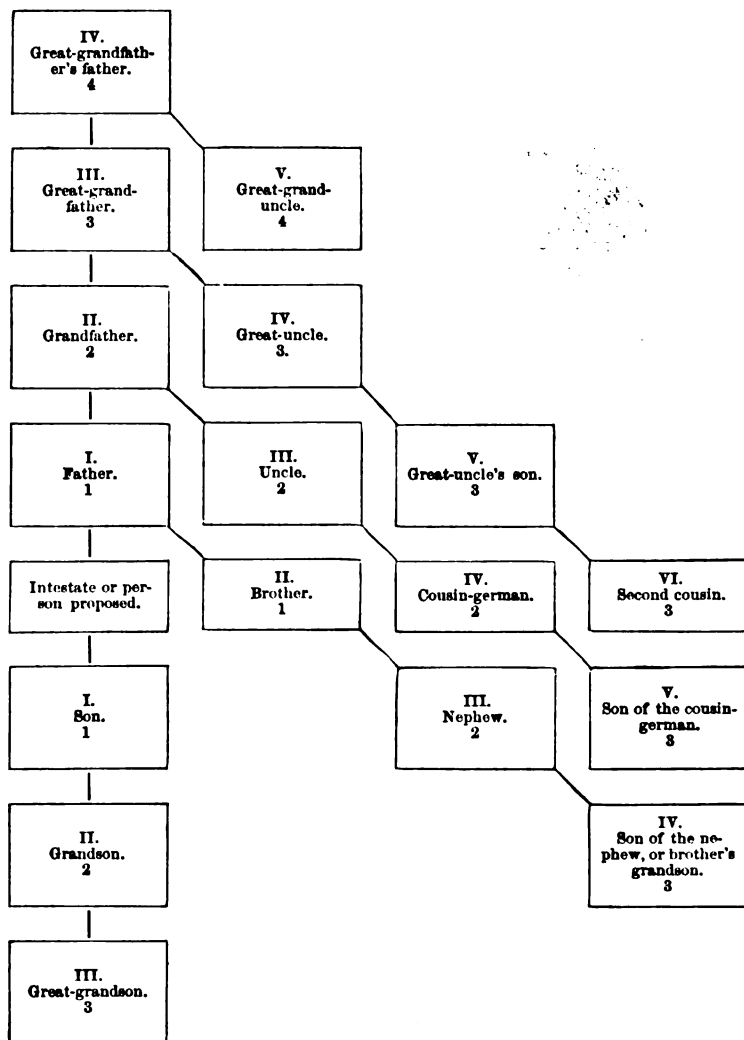
1968. Tables are frequently formed for the purpose of showing the history of a house or family, and how the persons therein named are connected together; this science is called genealogy, a word derived from two Greek words signifying race or line, and treatise or discourse. Genealogy is founded on the idea of lineage or family.

For illustrating descents and relationship genealogical tables are constructed, the order of which depends upon the end in view. In tables, the object of which is to show all the individuals embraced in a family, it is usual to begin with the oldest progenitor and to put all the persons of both sexes in descending and then in collateral lines. Others exhibit the ancestors of a particular person in ascending lines both of the father and mother's side. In this way 2, 4, 8, 16, 32, etc., ancestors are exhibited, doubling, as has already been observed, at every degree.

Some tables are constructed in the form of a tree, after the model of the canonical law (*arbor consanguinitatis*), in which the progenitor is placed beneath, as if for the root or stem. The persons descended from him are represented by the branches, one for each descendant. For example: if it be desired to form

¹⁷ Before, 250.

¹⁸ 4 Kent, Comm. 412, 4th ed.; 2 Hilliard, Real. Prop. 216.



the genealogical tree of Peter's family, Peter will be made the trunk of the tree; if he has had two children, John and James, their names will be written on the first two branches, which will themselves shoot out as many twigs as John and James have children; these will produce others, till the whole family shall be represented on the tree.

The word branch, which is used to designate a portion of a family, it will be perceived, is a metaphorical expression, which designates in the genealogy of a numerous family a portion of that family which has sprung from the same stock or root; these latter expressions, stock and root, like branch, are used in a figurative sense. Thus the origin, the application, and the use of the word branch in genealogy will at once be perceived.

1969. *Affinity* is a connection formed by marriage, which places the husband in the same degree of nominal propinquity to the relations of the wife as that in which she herself stands toward them, and gives to the wife the same reciprocal connections with the relations of the husband. The term is used in contradistinction to consanguinity, for affinity is no real kindred.

Affinity, or, as it is sometimes called, alliance, is very different from kindred. Kindred are relations by blood; affinity is the tie which exists between one of the spouses and the kindred of the other. Thus, the relations of my wife, her brothers, her sisters, her uncles, are allied to me by affinity, and my brothers, sisters, etc., are allied in the same way to my wife; but my brother and the sister of my wife are not allied by the ties of affinity.¹⁹

The degrees of affinity are computed in the same way as those of consanguinity.

1970. All *freehold estate in lands of inheritance descend to the heir*. Land owned in fee by the ancestor, together with all the buildings; permanent fixtures; things which, though personal in their nature or movable, are constructively attached to the real estate, as the keys of a house, title-deeds and the box in which they are kept, and heir-looms; all mines and minerals; trees, bushes, and fruits hanging by the roots; straw and manure, when raised on the land, unless under some special circumstances, when they are considered as personal property; fish in a pond; and wild animals, when in a helpless state, as whelps,²⁰ descend to the heir. All emblements are also considered part of the real estate, and descend to the heir.

A life estate, not being of inheritance, does not descend, because, on the death of the tenant for life, the estate is determined.

Terms of years, and other estates less than freehold, pass to the executor or administrator, and are not subjects of descent.

Personal property, whether in possession or in action, does not descend to the heir, but goes to the personal representatives of the deceased.

1971. In the English law the *rules of the law of descent* are established and well understood; they are generally calculated to protect the aristocracy and to keep landed estates in families, to the prejudice of the younger branches. With a more extended equity the laws in this country, though varying very much in their details in the different states, yet in general wisely unite in distributing the real estate of which the ancestor dies seised among his kindred who stand to him in the same degree of relationship.

It is not easy to lay down even general rules of inheritance. When it is considered that each state has a code of its own regulating descents which must necessarily in many matters of detail differ very essentially from all the others, the difficulty of the task will be easily perceived. The only safe mode of studying this subject is to consider with care the statute laws of descent of the particular state respecting which information is sought and the decisions of the courts of that state on the subject.

The law does not cast the descent on all the kindred alike. Following nature, it divides the kindred of every one, as before observed, into three classes:

His children and their descendants.

His father and mother, and other ascendants.

His collateral kindred; among whom are included, first, his brothers and sisters, and their descendants; second, his uncles, cousins, and other kindred of both sexes who are not the issue of a brother or sister. Nature herself, then, has established the order of descent in three lines—the descending, the ascending, and the collateral.

The preference given to one of these lines over the others does not depend on the proximity of the degree of each line compared with the degree of kindred of the other line.

Two things are to be observed: that the preference given to a class or line is

¹⁹ This has been fully explained, before, **251**.

²⁰ See before, Chap. xv.

independent of the proximity of the degree of either of the others, and the right or extent of the right of the kindred of each line among themselves.

1972. The law, following the order of nature, casts the descent in the first place on the children and other *descendants* of the ancestor; in other words, on his posterity. They are preferred to the exclusion of another class or order of ascendants or collaterals, even should the ascending or collateral kindred be connected to the ancestor in a nearer degree of relationship; for example, a great-grandson will be preferred to the father.

1973. But when the rights of descendants are to be ascertained, the question then is determined by finding out who is in the nearest degree of kindred; all descendants are then excluded who are further from the ancestor than the one in the nearest degree, unless they can claim by way of representation. By representation is meant the right which a child has to take the share of an estate which would have descended to him through his father or mother if he had lived until the descent was cast by the death of the ancestor.

1974. It is only when there is no posterity of the ancestor that the ascending or collateral line can inherit.

1975. It is a general rule of the law of inheritance that if a person owning real estate dies seised, or as owner, without devising the same, the estate will descend to his posterity in the direct line, and if there be but one person, then to him or her alone; and if more than one person, and all of equal degree of consanguinity to the ancestor, then the inheritance shall descend to the several persons as tenants in common in equal parts, however remote from the intestate the common degree of consanguinity may be. This rule is in favor of the equal claims of the descending line, in the same degree, without distinction of sex, and to the exclusion of all other claimants. In this case the heirs are said to take *per capita*, or by the head, each claiming in his own right and not by way of representation or of transmission.

The following example will illustrate the rule; it consists of three distinct cases:

Suppose Paul die seised of real estate, leaving two sons and a daughter; in this case the estate descends to them in equal parts.

If instead of children he should leave several grandchildren, two of them the children of his son Peter, and one the son of his son John, these will inherit the estate in equal proportion.

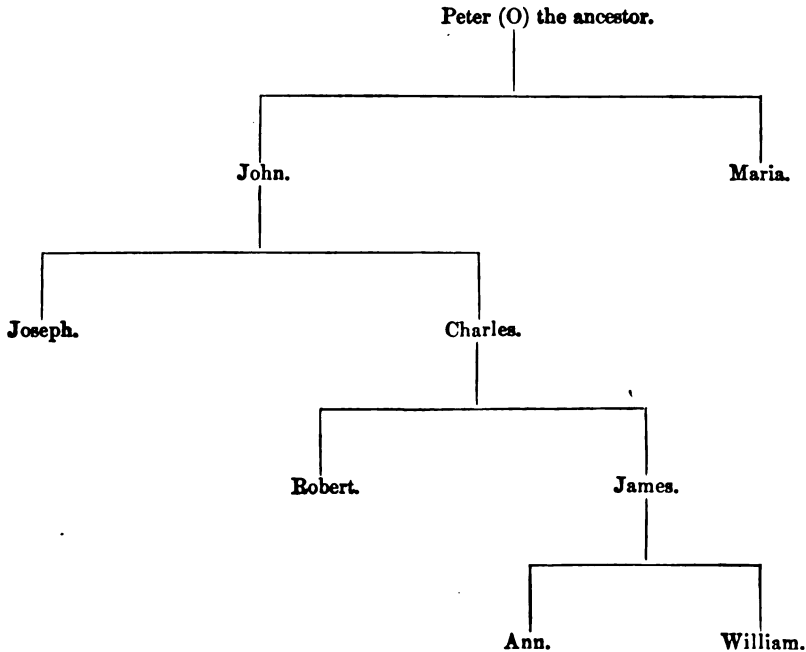
Instead of children and grandchildren suppose Paul had left ten great-grandchildren, one the descendant of his son John, and nine the descendants of his son Peter; these, like the others, would partake of the inheritance equally as tenants in common.

According to Chancellor Kent this rule prevails in all the United States, with this variation, that in Virginia the male descendants take double the share of the females, and in South Carolina the widow takes one-third of the estate in fee, and in Georgia she takes one child's share in fee, if there be any children, and if none, she then takes in each of those states a moiety of the estate. In North and South Carolina the claimants take in all cases *per stirpes*, or by way of representation, though standing in the same degree.²¹ In Louisiana the rule is, that in all cases when representation is admitted the partition is made by roots; if one root has produced several branches, the subdivision is to be made by roots in each branch, and the members of the branch take among themselves by head, or *per capita*.²²

²¹ 4 Kent, Comm. 391, 4th ed.; Reeves, Law of Descents, *passim*; Griffith, Reg. answer to 6th interrogatory under the head of each state.

²² La. Civ. Code, art. 895.

1976. When a person dies intestate, seised of lands of inheritance, and he leaves lawful issue in different degrees of consanguinity, the estate shall descend to the children and grandchildren of the ancestor, if any be living, and to the issue of such children and grandchildren as shall be dead, and so on to the remotest degree, as tenants in common; but such grandchildren and their descendants shall inherit only such shares as their parents respectively would have inherited if living. This rule may be illustrated by the following example: Suppose Peter, the ancestor, had two children, John dead and Maria living; John had two children, Joseph living and Charles dead; Charles had two children, Robert living and James dead; James had two children, both living, Ann and William, as represented in the following diagram:



In this case, Maria would inherit one-half; Joseph, the son of John, one-half of the half, or a quarter of the whole; Robert, one-eighth of the whole; William and Ann, each one-sixteenth of the whole, which they would hold as tenants in common in these proportions. This is called inheritance *per stirpes*, by roots, or representation, because the heirs who represent others take in such portions only as their immediate ancestors would have inherited if living.

1977. When the descending line is completely exhausted, the *ascending line* becomes generally entitled to the inheritance. When the owner of land dies intestate, and without lawful issue, leaving parents, it is the rule in some of the states that the inheritance shall ascend to them, first, to the father, and then to the mother, or jointly to both, under certain regulations established by the particular statutes. It is laid down by a learned writer,²³ as a general rule in the American law of descent, that when the intestate has left no lineal descendants, nor parents, nor brothers, nor sisters, nor their descendants, that the grandfather takes the estate before the uncles and aunts, as being nearest of kin to the intestate.

1978. It is nearly a general rule that the ascending line, after parents, is postponed to the collateral line of brothers and sisters. In Louisiana, the ascending line must be exhausted before the estate passes to collaterals.*

1979. When the intestate dies without issue, or parents, or other ancestors, the estate descends to his brothers and sisters, and their representatives.

1980. When there are such relations, and all of equal degree of consanguinity to the intestate, the inheritance descends to them in equal parts, however remote from the intestate the common degree of consanguinity may be; as, where they are all brothers and sisters, or all nephews and nieces.

1981. When some are living and others are dead, who stood in the same degree and who have left issue, the living shall take in their own right, and the descendants of the deceased shall take by representation the respective shares of the deceased, and each set divide such share *per capita*.

1982. Considerable difference exists in the laws of the several states when the next of kin are nephews and nieces, and uncles and aunts, who claim as standing in the same degree. In many of the states all these relations take equally as being next of kin; this is the rule in the states of New Hampshire, Vermont, (subject to the claim of males to a double portion,) Rhode Island, North Carolina, and Louisiana. In Alabama, Connecticut, Delaware, Kentucky, Georgia, Illinois, Maine, Maryland, Massachusetts, Mississippi, Missouri, New Jersey, New York, Ohio, Pennsylvania, South Carolina, Tennessee, and Virginia, on the contrary, nephews and nieces take in exclusion of uncles and aunts, though they be of equal degree of consanguinity to the intestate.

1983. When the intestate dies leaving no lineal descendants, nor parents, nor brothers, nor sisters, nor any of their descendants, nor grandparents, as a general rule, it is presumed the inheritance descends to the brothers and sisters of the intestate's parents, and to their descendants equally. When they all stand in the same degree to the intestate they take *per capita*, and when in unequal degree, *per stirpes*. To this general rule, however, there are slight variations in some of the states; as, in New York, grandparents do not take before collaterals.

1984. When the inheritance comes from the father, then the brothers or sisters of the father and their descendants shall have the preference, and in default of them the estate shall descend to the brothers and sisters of the mother, and their descendants; and when the inheritance comes to the intestate on the part of the mother, then her brothers and sisters and their descendants have the preference, and, in default of these, the brothers and sisters on the side of the father and their descendants inherit. This is a rule in a number of the states, though in some others there is perhaps no distinction as to the descent, whether the estate has been acquired by purchase or by descent from an ancestor.

1985. By the English common law, one related to an intestate of the half blood only could never inherit, upon the presumption that he is not of the blood of the original purchaser; in this country the common law principle on this subject may be considered as not being in force, though in some states some distinction is still preserved between the whole and the half blood.

1986. When there is a failure of heirs under the preceding rules, the inheritance descends to the remaining next of kin of the intestate according to the rules of the statute of distribution of the personal estate, subject to the doctrine in the preceding rules in the different states as to the half blood, to ancestral estates, and as to equality of distribution. This rule prevails in several states, subject to some peculiarities in the local laws of descent which extend to it.

1987. By *escheat* is understood by the English law an obstruction to the

* La. Civ. Code, art. 910.

course of descent and a consequent determination of the tenure, by some unforeseen contingency, in which the land naturally results back by a kind of reversion to the original grantor or lord of the fee.²⁵

All escheats under the English law are declared to be strictly feudal, and to import the extinction of tenure.²⁶ But as feudal tenures do not exist in this country, no private person can succeed to the inheritance by escheat. By virtue of its sovereignty, the state steps in in place of the feudal lord as original and ultimate proprietor of all lands which have no other lawful proprietor within its jurisdiction. It seems to be the universal rule of civilized states when the deceased owner has left no heirs competent to take it that it should vest in the public and be at the disposal of the government.²⁷

1988. *Forfeiture*, which has already been defined,²⁸ may take place in relation to lands and tenements by various means: By the commission of crimes and misdemeanors, by alienation contrary to law, by the non-performance of conditions, and by waste.

1989. By the constitution of the United States²⁹ it is declared that no attainder of treason shall work corruption of blood or forfeiture except during the life of the person attainted. And by a statute of the national legislature it is enacted that no conviction or judgment for the offences mentioned in the act shall work corruption of blood or forfeiture of estate.³⁰ As the offences punished by this act are of the blackest dye, including cases of treason, the punishment of forfeiture for crimes may be considered as thereby abolished by the general government.

The punishment of forfeiture for crimes is very much reduced, if it exist, under the state laws; and should it occur, the state takes the title the party had, and no more.

1990. By the English common law estates less than a fee may be forfeited to the party entitled to the residuary interest by a breach of duty in the owner of the particular estate. When a tenant for life or years, therefore, by feoffment, fine, or recovery, conveys a greater estate than he is by law entitled to do, he forfeits his estate to the person next entitled in remainder or reversion.³¹ But now by statute 8 and 9 Vict. c. 106, sect. 4, this ground of forfeiture is removed.

In this country such forfeitures are almost unknown, and the more just principle prevails that the conveyance by the tenant operates only on the interest he possessed, and does not affect the remainder-man or reversioner.³²

1991. An estate may be forfeited by a breach or non-performance of a condition annexed to the estate, either expressed in the deed in its original creation or implied by law, from a principle of natural reason.³³ The subject of breach and non-performance of conditions having been sufficiently considered in another place,³⁴ it is unnecessary to investigate the subject any further here.

²⁵ 2 Sharswood, Blackst. Comm. 244.

²⁶ Wright, Ten. 115-117; 1 W. Blackst. 123.

²⁷ Code, 10, 10, 1; Domat, Dr. Publ. liv. 1, t. 6, s. 3, n. 1. See 3 Dane, Abr. 140, s. 24; 1 Browne, Civ. Law, 250; 10 Viner, Abr. 139.

²⁸ Before, 1558.

²⁹ U. S. Const. art. 3, s. 2.

³⁰ Act of Congr. April 30, 1790. See Act of July, 1862, § 5, *et seq.*

³¹ 2 Sharswood, Blackst. Comm. 274. See Stump v. Findley, 2 Rawle, Penn. 168.

³² 4 Kent, Comm. 81, 82; McKee v. Pfout, 3 Dall. Penn. 486; Rogers v. Moore, 11 Conn. 553; Stevens v. Winship, 1 Pick. Mass. 318; McCony v. King, 3 Humphr. Tenn. 267; Dennett v. Dennett, 40 N. H. 505. That the rule is different in case of a conveyance by tenant by curtesy or dowress, see French v. Rollins, 21 Me. 372; Grant v. Chase, 17 Mass. 446; 4 Kent, Comm. 84.

³³ 2 Sharswood, Blackst. Comm. 281; O'Brien v. Doe, 6 Ala. N. s. 787.

³⁴ Before, 730, *et seq.*

1992. *Waste* is a spoil or destruction in houses, gardens, trees, or other corporeal hereditaments, to the disherison of him who has the remainder or reversion in fee simple or fee tail.³⁵ Waste is voluntary or permissive.

In England, by the statute of Gloucester, tenants for life, for years, in dower, or by the curtesy, are punishable for waste by a forfeiture of the thing or place wasted, and treble damages.

The provisions of this statute may be considered as generally in force in the United States, so far as it is applicable to our institutions. In some of the states some of its provisions have been re-enacted; in others, the statute is not in force, and its principles have not been adopted by the courts.³⁶

1993. *Merger* is the annihilation of one estate in another; it takes place when a greater estate and a less coincide and meet in one and the same person, without any intermediate estate; the less is immediately merged, that is, sunk or drowned in the latter; example, if there be a tenant for years, and the reversion in fee simple descends to or is purchased by him, the term of years is merged in the inheritance, and no longer exists; but they must be in one and the same person, at one and the same time, in one and the same right.³⁷

1994. Although there is some resemblance between a merger and a surrender, yet they are easily distinguishable in many cases. A surrender is one of the many modes by which a merger may be effected, but it is not the only one. It must be made by the tenant of the particular estate, and he must relinquish his right to the reversioner or remainder-man. A merger is confined to cases in which the tenant of the estate in reversion or remainder grants that estate to the tenant of the particular estate, or in which the particular tenant grants his estate to the reversioner or remainder-man.³⁸ Surrender is the act of the party; merger, the act of the law.

Merger bears also some resemblance to suspension and extinguishment. The difference between them is pointed out with much clearness in the following extract: "Merger is the annihilation of one estate in another. Suspension is a partial extinguishment, or extinguishment for a time. Extinguishment is the annihilation of a collateral thing or subject, in the subject itself out of which it is derived. A rent, a common, a seignory, may be extinguished. That the estate in the rent, common, or seignory ceases is the consequence of the extinguishment of the subject itself. When the subject ceases the estate therein must also cease. Under the doctrine of merger the subject may continue after the annihilation of one estate in another; for notwithstanding the annihilation of the estate the subject continues, and the effect of the merger is only to involve the time of one estate in the time of another estate, or, at the utmost, to accelerate the right of possession under the more remote estate. Thus suspension and extinguishment, correctly taken, are applicable rather to the things themselves than to the estates or degrees of interest therein. Again, suspension is merely for a time, because the party whose interest is to be suspended has a particular estate, or because he has a defeasible interest, so that the subject itself or the estate therein may revive when there shall be a separation of these interests, which, if they were absolutely united, would be extinguished."³⁹

1995. In order to create a merger there must be two estates, distinct from

³⁵ 2 Sharswood, Blackst. Comm. 281; Coke, Litt. 53.

³⁶ See beyond, 2409.

³⁷ 2 Sharswood, Blackst. Comm. 177; Phillips v. Bardell, 2 Binn. Penn. 142; 3 Yeates, Penn. 128. A mortgage does not necessarily merge in consequence of an assignment of it being made to the owner of the mortgaged premises, if the intention of the parties was otherwise. Moore v. Harrisburg Bank, 8 Watts, Penn. 138.

³⁸ 3 Preston, Conv. 23, 153.

³⁹ 3 Preston, Conv. 9, 10, 11.

each other, in the same person; therefore when there is but one estate the merger does not take place. For example, a lease made to A and his assigns, for the lives of himself and two others, is considered but one freehold. But where the estate is not joint, but successive, then the estates being distinct a merger may take place.⁴⁰

Where an estate and a mere right in the land, not an estate, meet in the same person, the merger will not take place, because such an interest is not an estate.⁴¹ The merger must be produced either from the meeting of an estate of higher degree with an estate of inferior degree, or from the meeting of the particular estate and the immediate reversion or remainder in the same person; for when there is an intermediate estate, that will prevent the merger. As soon as the intermediate estate determines, however, this removes the impediment to the merger.⁴²

To create a merger the estates must meet in the same party and at the same time, and in the same right; for if they are held by the party at different times, the right and duty do not meet; and if they be held in different rights, as where the life estate is held by A in his own right, and an estate for years is held by him as executor, there can be no merger.

The estate in which the merger takes place is not enlarged by the accession of the smaller estate; and the greater, or only subsisting estate, continues after the merger precisely of the quality and extent of ownership as it was before the accession of the estate which is merged, and the lesser estate is extinguished.⁴³

⁴⁰ *Roose's Case*, 5 Coke, 13; *Ross v. Aldwick*, Croke, Eliz. 191; *Gouldsb.* 187; 15 Viner, Abr. 366.

⁴¹ *Pawling v. Hardy*, Skinn. 2, 62.

⁴² *Bate's Case*, 1 Salk, 254.

⁴³ 3 Preston, Conv. 7.

CHAPTER XXVII.

TITLE TO REAL ESTATE BY DEED AND BY RECORD.

- 1996-2087. Alienation by deed.
 - 1997. What estate may be alienated.
 - 1998. By whom alienation may be made.
 - 1999. To whom alienation may be made.
- 2000-2047. By what instrument.
- 2003-2008. Form of deeds.
 - 2003. Indentures.
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- 2009-2032. General requisites of deeds.
 - 2010. The parties.
 - 2011. The deed must be written, and on paper.
 - 2014. The consideration.
 - 2015. The words to be used.
 - 2016. The reading of the deed.
 - 2017. The signature and seal.
 - 2021. The witnesses.
- 2022-2030. The delivery.
 - 2023. By whom delivery must be made.
 - 2024. To whom delivery should be made.
 - 2025. Express delivery.
 - 2026. Implied delivery.
 - 2027. Absolute delivery.
 - 2028. Conditional delivery.
 - 2030. The delivery must be voluntary.
 - 2031. Of recording deeds.
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 - 2073. Effect of a confirmation.
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- 2079-2086. Conveyances under the statute of uses.
- 2080-2082. Bargain and sale.
 - 2081. Requisites of a bargain and sale.
 - 2082. What estate passes.
 - 2083. Lease and release.
 - 2084. Covenant to stand seised to uses.
 - 2085. Deeds to lead and declare uses.
 - 2086. Deeds of revocation of uses.
 - 2087. Conveyances in the United States.
- 2088-2098. Alienation by matter of record.
 - 2089. Acts of legislature and patents.
- 2092-2098. Fines and recoveries.
 - 2093. Fines.
 - 2096. Common recoveries.

1996. *Alienation* is the act by which the title to an estate is voluntarily resigned by one person and accepted by another in the form prescribed by law.¹ In this chapter we shall consider alienation by deed and by record, and under the first of these subjects we shall consider, first, what estates may be alienated; second, by whom the alienation may be made; third, to whom the alienation may be made; fourth, by what instrument; fifth, the several kinds of deeds at common law; and, sixth, conveyances under the statute of uses.

1997. In general, all the real estate which a man owns and of which he is seised may be alienated, and there is no restriction to its transfer and conveyance. A fee simple, a life estate, a term of years may be transferred by deed; and an incorporeal hereditament, which lies in grant, may be alienated by a deed.

By the English law there is one check to this power of alienation by the statute of 32 Hen. VIII, c. 9, which forbids the sale of pretended titles; that is, the sale of land of which another is in possession holding adversely to the claim. Every grant of land, therefore, except as a release, is void as an act of maintenance, if at the time the lands are in the possession of another person claiming under a title adverse to that of the grantor.² This statute imposed a forfeiture upon the seller of the whole value of the lands sold, and the same penalty upon the buyer also, if he purchased knowingly.

Although the provisions of this statute, which appears to have been enacted

¹ Coke, Litt. 118, b; Cruise, Dig. tit. 32, c. 1, s. 1.

² Litt. § 347.

to prevent rich and powerful men from oppressing the weak,³ seem to have no application in this country, where none are above the law and none below its protection, yet its provisions, somewhat modified, prevail in Connecticut, Massachusetts, Vermont, Maryland, New York, North Carolina, Indiana, Kentucky, Tennessee, and probably in some other states. In Illinois, Louisiana, Missouri, New Hampshire, and Pennsylvania, a conveyance by a disseisee passes to the purchaser the title which he has at the time of the conveyance.⁴

1998. A tenant in fee simple has an unrestrained power of alienation, and any attempt to limit this power would be void.⁵ A tenant for life may alienate the whole or a part of his estate, unless restrained by some condition,⁶ and so may a tenant for years. A corporation authorized to hold real estate may alienate it in fee, or for life, or years.

But in order to convey the title the grantor or alienor must be *sui juris*, or capable to perform such an act by authority of a statute. An infant or a person *non compos mentis* cannot of course make a lawful conveyance. But married women are generally authorized in this country to make a conveyance of their lands and divest themselves of all right by pursuing the directions of the statutes of the state where the lands lie, and acknowledging the deed before such judges or other magistrates as those laws require.⁷

1999. Every citizen capable of making a contract may take lands by purchase, and every citizen by descent or devise.

An alien by the common law could acquire by purchase only a defeasible estate, of which he was liable to be divested in behalf of the sovereign by office found. Until this proceeding was had, however, he could sell and convey the land and give good title.⁸ And in the same way an alien might take by devise.⁹ He could not, however, take by descent,¹⁰ or transmit to his heirs by inheritance.¹¹ The distinction is that by any act of the party conveying, which amounts to an estoppel, the grantor and his heirs are bound, and no other person has any title by aid of which to intervene, but that no transfer by effect of law can take place.¹²

By statute, however, these rules of the common law have been very materially modified. In some of the states there are substantially no restrictions on the power of aliens to purchase, hold and convey, transmit and inherit real estate.¹³

³ Coke, Litt. 214, a.

⁴ Litt. § 360.

⁵ See Bouvier, Law Dict. *Acknowledgment*.

⁶ 4 Kent, Comm. 448, 449.

⁷ Wittingham's case, 8 Coke, 44.

⁸ Orr v. Hodgson, 4 Wheat. 453; Doe v. Robertson, 11 id. 332; Fox v. Southack, 12 Mass. 143; Scanlan v. Wright, 13 Pick. Mass. 523; Montgomery v. Dorion, 7 N. H. 475; Mooers v. White, 6 Johns. Ch. N. Y. 365; Buchanan v. Deshon, 1 Harr. & G. Md. 280; Marshall v. Conrad, 5 Call, Va. 264; Dudley v. Grayson, 6 T. B. Monr. Ky. 260.

⁹ Fairfax v. Hunter, 7 Cranch, 603; Mooers v. White, 6 Johns. Ch. N. Y. 365; Vaux v. Nesbit, 1 McCord, Ch. So. C. 352. See Gillmore v. Kay, 2 Hayw. No. C. 108.

¹⁰ Mooers v. White, 6 Johns. Ch. N. Y. 360; Stevenson v. Dunlap, 7 T. B. Monr. Ky. 143; Vaux v. Nesbit, 1 McCord, Ch. So. C. 370; Paul v. Ward, 4 Dev. No. C. 249.

¹¹ Levy v. McCartee, 6 Pet. 102; Dawson v. Godfrey, 4 Cranch, 321; Doe v. Lozenby, 1 Smith, Ind. 203; Jackson v. Green, 7 Wend. N. Y. 333.

¹² See Commonwealth v. Heirs of Andre, 3 Pick. Mass. 224; Jackson v. Goodell, 20 Johns. N. Y. 707, where it is held that a conveyance with warranty to an alien by the state enables the grantee's heirs to inherit. And see Carver v. Jackson, 4 Pet. 87; Garwood v. Dennis, 4 Binn. Penn. 314.

¹³ In Connecticut, Iowa, Maine, Maryland, Massachusetts, Michigan, Ohio, Pennsylvania, and Wisconsin, all disabilities are removed. In Florida and New Jersey, they may purchase, hold, and devise lands as citizens. In California, Mississippi, Missouri, New Hampshire, Tennessee, and Texas, resident aliens may take hold, convey, and devise like citizens, except that in Tennessee there must be a declaration of intention to become a citizen within one year of the taking, and in Texas there must have been a declaration of intention to become a citizen. In Arkansas, Delaware, Georgia, Rhode Island, and South Carolina, they may purchase and convey lands if they have declared their intention of becoming citizens; and

2000. *Conveyance* is the transfer of the title of land by one or more persons to another or others. By persons here is meant not only natural persons, but corporations. The instrument which conveys the property is also called a conveyance.

2001. The term assurance or common assurance is more extensive in its signification. In an enlarged sense, it includes all instruments which dispose of property, whether they be the grants of private persons or not; such as fines, and recoveries, and private acts of the legislature.¹⁴

2002. Lands may be alienated by deed, by matter of record, and by devise. We will first consider alienations by deed.

In speaking of the form of contracts we had occasion to define a deed to be an instrument under seal, written or printed, containing some contract or agreement, and which has been delivered by the parties.¹⁵ And in a more confined sense a deed is an instrument executed by the parties for the conveyance of land.

In considering the instrument of conveyance we shall inquire, first, as to the form of deeds; second, as to their general requisites; third, as to their several parts.

2003. *An indenture* is a deed to which there are two or more parties who enter into reciprocal grants or obligations to each other. Indentures are called bipartite, tripartite, etc., according to the number of contracting parties. Each party may consist of one or of several individuals.

Anciently, two instruments were written on the same piece of paper or parchment, which were precisely alike, or the two parts of a mutual agreement were so written. On the line where they were to be separated the letters of the alphabet or some particular words were written in a large hand, and the two deeds were separated by cutting across those letters in an indented manner, *instar dentium*, so as to leave one-half of the word on one part and half on the other. Deeds thus made were denominated *syngrapha* by the canonists because that word, instead of the letters of the alphabet, or the word *chirographum*, was used.

In time it came to be the practice to indent deeds, although they were made only on one skin of parchment and there was no counterpart. At present the indenting is of no consequence; besides, it would be extremely difficult to cut a piece of parchment or paper, even with the sharpest instrument, so that no indentation could be perceived by the aid of the microscope.

This instrument usually commences with these words, "This Indenture." Formerly they were insufficient unless the instrument was actually and visibly indented. But now an instrument commencing with these words is a deed indented, for every legal purpose.¹⁶

2004. A *deed poll* is an instrument, written or printed on parchment or paper, executed under the hand and seal of the party, by which one person conveys or grants some estate or right to some other; it is shaved or polled at the top. It is for this reason called a deed poll or single deed.¹⁷

in *Arkansas* and *Delaware*, they may take by descent if they are also residents at the death of the intestate. In *Rhode Island*, they must obtain, in addition, authority from a judge of probate. In *Kentucky*, alien friends, ten years resident, may receive, inherit, hold, pass by descent or otherwise, while resident. In *Virginia*, they may hold for residence, trade, or manufacture, for not exceeding twenty years. In *New York*, they may take in fee if they have taken incipient steps to become citizens; and, if they make oath, may, within six years, sell, assign, or devise. In *Alabama* and *North Carolina*, the common law prevails. In *Vermont*, there is no statute. 1 Washburn, Real Prop. 49, note.

¹⁴ Eunom. Dial. 2, s. 5.

¹⁵ Currie v. Donald, 2 Wash. Va. 58.

¹⁷ Coke, Litt. 299, a.

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¹⁶ Before, 874.

Strictly speaking, a deed poll is not an agreement between two persons, but a declaration by one particular person respecting an agreement made by him with some other person; for example, a feoffment from A to B, by deed poll, is not an agreement between A and B, but is rather a declaration by A, addressed to all mankind, informing them that he thereby gives and enfeoffs B of certain lands therein described.¹⁸ In form it is as follows: "Know all men by these presents that I, A B, have given, granted, and enfeoffed, and by these presents do give, grant, and enfeoff," etc.

In the United States the distinction between indentures and deeds poll is of little if any practical consequence, the effects upon the rights of the parties being substantially the same.¹⁹

2005. When speaking of an instrument we say it is *original* when it is authentic, and is to serve as an example or model to be copied or imitated; the term is used in contradistinction to a copy. An original deed is one which is executed by the parties to it, to be evidence of their act. Originals are single or duplicate: single when there is but one, duplicate when there are two.²⁰

2006. Formerly each party to an indenture executed a separate deed; that part which was executed by the grantor was called the original, and the rest the *counterparts*.²¹ It is now usual for all the parties to execute every part, and that makes them all originals.

2007. *Deeds de una parte* are those where only one party grants, gives, or binds himself to do a thing to another. A deed poll is an example of this kind. By that deed one of the parties grants every thing, and the other receives every thing. In one sense it is true there can be no deed absolutely *de una parte*.²²

2008. The technical expression *inter partes* signifies an agreement professing in the outset, and before any stipulations are introduced, to be made between such and such persons; as, for example, "This Indenture made the — day of —, 1851, between A B, of the one part, and C D, of the other part." It is true that every contract is in one sense *inter partes*, because to be valid there must be two parties at least; but the technical sense of this expression is as above mentioned.²³

This being a solemn declaration, the effect of such introduction is to make all the covenants comprised in a deed to be covenants between the parties and none others; so that should a stipulation be found in the body of a deed between A B, of the one part, and C D, of the other part, by which "the said A B covenants with E F to pay him one hundred dollars," the words "with E F" are inoperative, unless they have been used to denote for whose benefit the stipulation may have been made, being in direct contradiction with what was previously declared; and C D alone can sue for the non-payment, it being a maxim that where two opposite and irreconcilable intentions are expressed in a contract the first in order shall prevail.²⁴

When there are more than two sides to a contract *inter partes*, for example, a deed, as where it is "made between A B, of the first part, C D, of the second

¹⁸ A deed poll is the deed of the party making it, and concludes him only. *Giles v. Pratt*, 2 Hill, So. C. 439.

¹⁹ *Finley v. Simpson*, 2 N. J. 311; *Phelps v. Phelps*, 17 Md. 120; *Newell v. Hill*, 2 Metc. Mass. 180; *Maule v. Weaver*, 7 Penn. St. 329.

²⁰ See *Dudley v. Sumner*, 5 Mass. 438.

²¹ *Sheppard, Touchst.* 55.

²² *Sheppard, Touchst.* 50.

²³ *Addison, Contr.* 9; *Hammond, Part.* 18.

²⁴ 8 Mod. 116; 1 Show. 58; 3 Lev. 138; 7 Mee. & W. Exch. 63; *Hornbeck v. Westbrook*, 9 Johns. N. Y. 73. But this rule does not apply to simple contracts *inter partes*. 2 Dowl. & R. 273.

part, and E F, of the third part," there is no objection to one covenanting with another in exclusion of a third.²⁵

2009. *The general requisites* of deeds are, that there be sufficient parties; that the deed be in writing or printing, on paper or parchment; that there be a consideration; that sufficient words be used; that it be read when required; that it be signed and sealed; that it be witnessed; that it be delivered; and that it be acknowledged and recorded.

2010. *The parties* to a deed are those persons who grant, give, or convey some estate or thing, or agree to perform and do some act, and those to whom a grant, a gift, or conveyance is made with their consent,²⁶ or who agree to receive the performance of something. In general, all persons can make or accept a deed unless they labor under some legal disability, such as want of reason, infancy, or insanity; or want of will; as, where a woman is under coverture, or where a person is under duress, or, in consequence of their situation, they are disqualified, as being trustees.

He who makes the deed is called the grantor, and the other party is denominated the grantee.

In general, the names and surnames of the parties ought to be used; but it is said that the law knows but one Christian name, and that therefore the omission of the middle name, or of the initial letter representing it, in a deed of conveyance is immaterial.²⁷ It has, however, been holden that if a deed is made to certain persons, members of a firm, by the social name, as A, B & Co., those named, namely, A and B, can take, and they will be trustees for themselves and their other co-partners.²⁸ And a deed to "P H & Son," it seems, was sufficient to enable the son to take under it, that being a sufficient description.²⁹

When made by an attorney, the deed should be in the name of the principal; and the attorney must be appointed by deed.³⁰

A deed by a corporation must be executed in the corporate name, by officers lawfully authorized, and under the corporate seal.³¹

2011. Though formerly lands were conveyed in England by a sale and livery of seisin, which was a ceremony used under the common law, they are transferred in this country generally by deed, which dispenses with this ceremony; recording has the same effect.³² Livery of seisin was in deed, which was performed by the feoffor going upon the land and delivering possession of it to the purchaser; or in law, when the same was not done upon the land, but in sight of it.³³

The statutes to prevent frauds and perjuries require that all contracts to grant estates and interests in lands (except leases not exceeding three years) shall be in writing.³⁴

The agreement must be reduced to writing, under which is included printing,

²⁵ Addison, Contr. 267. See *Scott v. Whipple*, 5 Me. 336; *Hornbeck v. Westbrook*, 9 Johns. N. Y. 73.

²⁶ *Mallory v. Stodder*, 6 Ala. N. S. 801.

²⁷ *Dunn v. Games*, 1 McLean, C. C. 321; *Bouvier, Law Dict. Name*; *James v. Stiles*, 14 Pet. 322.

²⁸ *Beaman v. Whitney*, 20 Me. 413.

²⁹ *Hoffman v. Porter*, 2 Brock. C. C. 156.

³⁰ *Harper v. Hampton*, 1 Harr. & J. Md. 622; *Plummer v. Russell*, 2 Bibb, Ky. 174; *Elwell v. Shaw*, 16 Mass. 42; *Barger v. Miller*, 4 Wash. C. C. 280; *Beales v. Grum*, 11 Serg. & R. Penn. 299; *Smith v. Dickinson*, 6 Humphr. Tenn. 261.

³¹ *Hatch v. Barr*, 1 Ohio, 390.

³² In Maryland, however, it seems that a deed cannot operate as a feoffment without livery of seisin. *Matthews v. Ward*, 10 Gill & J. Md. 443, contradicts this. 5 Harr. & J. Md. 158.

³³ 2 Sharswood, Blackst. Comm. 315, 316.

³⁴ Before, §10.

before the deed is delivered, for the delivery of a blank piece of paper signed and sealed by the party is not a deed.³⁶

2012. To prevent frauds from easy alterations the writing must be on paper or parchment, for if it be written on wood, linen, the bark of a tree, a stone, or the like, and it be delivered as a deed, it will not have that operation.³⁶

2013. It may be written in any known language, and in any hand writing usually understood by persons versed in such hand writing.

2014. As between the grantor and the grantee, no *consideration* need be proved, the seal always imports one; and one is generally mentioned in the deed. The amount of the consideration is of little consequence between the parties where everything is fair and clear of fraud.³⁷

One dollar is as good a consideration, in such cases, as a thousand dollars. It is when creditors are to be affected that it becomes requisite to inquire into the justice of the consideration and the fairness of the transaction.

And as between the parties, the consideration recited in the deed cannot be inquired into.³⁸

The English statutes of 13 Eliz. c. 5, and 27 Eliz. c. 4, already considered in this work,³⁹ render void any fraudulent gifts or conveyances. The first relates to creditors, and the last to purchasers of lands. These statutes have been re-enacted, or their principles adopted, in nearly all the states of the Union, though with some modifications and alterations.⁴⁰

In this country a *bona fide* purchaser for a valuable consideration is protected, whether he purchase from a fraudulent grantor or a fraudulent grantee; and there is no difference in this respect between a deed to defraud subsequent creditors, and one to defraud subsequent purchasers.⁴¹

The deed may be founded on a good or a valuable consideration, the nature of which has already been considered.⁴²

2015. *The words* used must be set forth according to law; that is, there must be words sufficient to signify the terms and conditions of the contract. It is not indispensably requisite to have all the usual formal parts drawn out in deeds; nor will a palpable mistake of a word defeat a deed when the intent of the parties is manifest.⁴³ This subject will be more fully considered when we come to treat of the several parts of a deed further on.

2016. When it is required by a party, *the deed should be read*. If he is able to read, he should read it himself, and if he is not able to read it, then he should require it to be read to him; but if, being able to read, he neglect to read it, or,

³⁶ *Duncan v. Hodges*, 4 McCord, So. C. 239; *Perminster v. McDaniel*, 1 Hill, So. C. 267; *Sheppard, Touchst.* 54; *Warring v. Williams*, 8 Pick. Mass. 326; *Burns v. Lynde*, 6 All. Mass. 305; *Chase v. Palmer*, 29 Ill. 306; *Davidson v. Cooper*, 11 Mees. & W. Exch. 793. See contra, *Woolley v. Constant*, 4 Johns. N. Y. 54; *Wiley v. Moor*, 17 Serg. & R. Penn. 438.

³⁷ *Sheppard, Touchst.* 54; *Warren v. Lynch*, 5 Johns. N. Y. 246.

³⁸ *Croft v. Bunster*, 9 Wisc. 503.

³⁹ *Prescott v. Hayes*, 43 N. H. 593; *Clark v. Troy*, 20 Cal. 219; *Randall v. Ghent*, 19 Ind. 221; *Croft v. Bunster*, 9 Wisc. 503; *Winans v. Peebles*, 31 Barb. N. Y. 371. See *Kinnebrew v. Kinnebrew*, 35 Ala. N. S. 628.

⁴⁰ Before, 673.

⁴¹ 3 Johns. Ch. N. Y. 481; 8 Wheat. 229; Dane, Abr.; Hare & Wall. Amer. Lead. Cas. 33-69. The principles of these statutes of 13 & 27 Eliz. were borrowed from the civil or Roman law. Dig. 42, 8, 5, 11; 2 Bell, Com. 182, 5th ed.

⁴² *Price v. Jenkin*, 4 Watts, Penn. 85; *Thompson v. McLean*, 1 Ashm. Penn. 129; *Somes v. Brower*, 2 Pick. Mass. 184; *Bean v. Smith*, 2 Mas. C. C. 252; *Anderson v. Roberts*, 13 Johns. N. Y. 515; *Bridge v. Eggleston*, 14 Mass. 245.

⁴³ See *Smith v. Allen*, 5 All. Mass. 454; *Ellinger v. Crawl*, 17 Md. 361.

⁴⁴ Dougl. 384.

if not able, he neglect to ask to have it read, and he sign and execute it, he will be bound by it.⁴⁴

If the deed is read to a blind or an illiterate man falsely, with an intent to deceive him, it is a fraud, and the deed is void on this account; and if it be incorrectly read by mistake, although there is no fraud, the deed cannot stand, because the grantor did not intend to execute such a deed as he executed, but such as was read to him.⁴⁵ This must be in a case where he is himself acting in good faith, for if he purposely procure some one to read it to him falsely, with an intent to avoid it afterward, he will be bound by it.⁴⁶

2017. In England, under the Saxon rule, the customary mode of execution was by *signing* the name and affixing the sign of the cross where the party could write, and where he could not write, by making the sign of the cross. On account of the general inability to write, the Normans introduced the custom of sealing merely, which before that time had not been generally practiced, though the case of a charter granted by King Edwin about one hundred years before the conquest, which was sealed, is cited by Coke, and this came to be the prevailing custom by the time of Edward III. In time, however, the practice of signing revived, and by the stat. 29 Charles II, c. 3, deeds and other contracts respecting lands, with the exception of leases for three years or less, are required to be signed. It has been claimed that even under this statute sealing included signing.⁴⁷ This is, however, denied by later decisions.⁴⁸

2018. In the United States the laws and usages upon this subject have changed from time to time, and it is stated by Professor Washburn that in all the states except Florida, Mississippi, North Carolina, and Texas, signing is requisite to the validity of a deed.⁴⁹ In Kentucky, sealing and delivery only were formerly requisite.⁵⁰ A badly-formed signature will not invalidate the deed.

2019. The practice of *sealing* deeds is very ancient. It prevailed on the continent of Europe during the time of Charlemagne, and was probably introduced into England at the time of the Norman conquest. Seals were at first used by the kings and nobles, but by degrees their use became general, and the practice has continued to this day, when, owing to the general diffusion of knowledge, the reason for using them has ceased.

At common law the seal has been absolutely necessary to the validity of a deed since the time of Edward III, and this provision of the common law remains unchanged in this country except in the states of Alabama, Iowa, Kentucky, and Louisiana.⁵¹

Formerly it was held that a seal must be of wax or some substance capable of retaining an impression, but in some states this has been modified.⁵²

2020. It is usual in practice for scriveners to prepare the deed and attach

⁴⁴ Sheppard, Touchst. 56; Rex v. Longnor, 1 Nev. & M. 576; Vide Hallenbach v. De Witt, 2 Johns. N. Y. 404; Manser's case, 2 Coke, 3; Thoroughgood's case, 2 Coke, 9; Shulter's case, 12 Coke, 90; Anon. Skinn. 159; Longchamp v. Fish, 2 Bos. & P. 415; Shanks v. Christopher, 3 Marsh. 145; Rossiter v. Simmons, 6 Serg. & R. Penn. 452.

⁴⁵ Jackson v. Hayner, 12 Johns. N. Y. 469.

⁴⁶ Sheppard, Touchst. 56.

⁴⁷ Strange, 724.

⁴⁸ Smith v. Evans, 1 Wils. 213; Ellis v. Smith, 1 Ves. Ch. 13.

⁴⁹ 2 Washburn, Real Prop. 569. See also Hutchins v. Byrnes, 9 Gray, Mass. 367; Isham v. Bennington Co. 19 Vt. 252; Elliott v. Sleeper, 2 N. H. 529; McDill v. McDill, 1 Dall. Penn. 64; Clark v. Graham, 6 Wheat. 579.

⁵⁰ Sicard v. Davis, 6 Pet. 124; Plummer v. Russell, 2 Bibb, Ky. 174. See Chiles v. Conley, 2 Dan. Ky. 21.

⁵¹ Taylor v. Glazer, 2 Serg. & R. Penn. 502; Mitchell v. Parham, 1 Harp. So. C. 1; Hubbard v. Beckwith, 1 Bibb, Ky. 492; Warren v. Lynch, 5 Johns. N. Y. 239; Deming v. Bullitt, 1 Blackf. Ind. 241; Davis v. Judd, 6 Wisc. 85.

⁵² See before, § 77.

the seal to it; it is then signed, the seal is adopted by the grantor, and the deed is delivered by him. It is not requisite that a man should appose his seal to the instrument; he may adopt another man's, or two persons may adopt the same seal.⁵³ Upon the same principle, that an individual may adopt any seal he pleases, a corporation may seal a deed with another than their common seal.⁵⁴

2021. In order to prove the execution of a deed there should be *witnesses* to the execution. In common practice, one or more persons present at the execution subscribe their names to the statement "sealed and delivered in presence of us," or some equivalent form. At common law no subscribing witnesses are requisite to the validity of a deed, and the signature may be proved by witnesses familiar with the hand writing of the grantor. In Alabama, Illinois, Massachusetts, Maine, North Carolina, and Pennsylvania, the common law rule prevails.⁵⁵ By statute, however, witnesses may be required, as in Mississippi and Maryland, where one is necessary,⁵⁶ and in Connecticut, Delaware, Georgia, Indiana, Kentucky, Michigan, New Hampshire, Ohio, South Carolina, Tennessee, and Vermont, two are required;⁵⁷ though as between the parties the deed is valid in Kentucky without witnesses.⁵⁸ In New York, there must be a subscribing witness or an acknowledgment to give effect to the deed, as against a subsequent purchaser.⁵⁹ A deed cannot be given in evidence unless there is one attesting witness in Alabama, Arkansas, Illinois, Indiana, and New Jersey.⁶⁰ In some of the states, as in California, Massachusetts, Wisconsin, and some others, witnesses are necessary to obtain the registration of an unacknowledged deed.⁶¹

2022. Until a deed is delivered it remains completely in the power of the grantor, and it is of no effect whatever as a conveyance; it must, therefore, be delivered to give validity.⁶² By *delivery* is understood the voluntary transfer of a deed from the grantor to the grantee, in such a manner as to vest a right in the latter and divest it out of the former.⁶³

The delivery of a deed is a very important circumstance, because it takes effect from the time of such delivery, and not from the time of its date, particularly as regards third persons, creditors, for instance.⁶⁴

It is not necessary that there should be a date to a deed though it has been

⁵³ Mackey v. Bloodgood, 9 Johns. N. Y. 285.

⁵⁴ Sheppard, Touchst. 57; Tenney v. East Warren Co. 43 N. H. 343; Johnston v. Crawley, 25 Ga. 316; Phillips v. Coffee, 17 Ill. 154; Porter v. Androscoggin R. Co. 37 Me. 349. See also Bank v. Rutland R. Co. 30 Vt. 159. But see Anon. 12 Mod. 423; Stebbins v. Merritt, 10 Cush. Mass. 27; Koehler v. Black River Co. 2 Black. 715; State v. Allis, 18 Ark. 269; Osborne v. Tunis, 1 Dutch, N. J. 633; Turnpike Co. v. McCullough, 25 Penn. St. 303.

⁵⁵ Ingram v. Hall, 1 Hayw. No. C. 205; Wiswall v. Ross, 13 Ala. 321; Long v. Ramsay, 1 Serg. & R. Penn. 73; Dole v. Thurlow, 12 Metc. Mass. 157; Dundy v. Chambers, 23 Ill. 369.

⁵⁶ Md. Code, 1860, 133; Shirley v. Fearne, 33 Miss. 653.

⁵⁷ Coit v. Stackweather, 8 Conn. 289; Winsted Bank v. Spencer, 26 id. 195; Richardson v. Bates, 8 Ohio St. 261; Craig v. Pinson, Cheves, So. C. 273; Stone v. Ashley, 13 N. H. 38.

⁵⁸ Fitzhugh v. Croghan, 2 J. J. Marsh. Ky. 429.

⁵⁹ Genter v. Morrison, 31 Barb. N. Y. 155.

⁶⁰ 2 Washburn, Real Prop. 572.

⁶¹ Clark v. Troy, 20 Cal. 219; Myrick v. McMillan, 13 Wisc. 188.

⁶² Hatch v. Hatch, 9 Mass. 307; Jackson v. Leet, 12 Wend. N. Y. 105; Friesbie v. McCarty, 5 Ala. 56; Fay v. Richardson, 7 Pick. Mass. 91; Carr v. Hixie, 5 Mas. C. C. 60; Alexander v. Bland, Cooke, Dist. Ct. 431; Hughes v. Easton, 4 J. J. Marsh. Ky. 572; 1 Johns. Cas. N. Y. 114.

⁶³ Mere manual tradition is not necessarily a delivery. Cincinnati v. Iliff, 13 Ohio St. 235; Graves v. Dudley, 20 N. Y. 96. Nor, it seems, is such tradition always necessary. Stevens v. Hatch, 6 Minn. 64.

⁶⁴ Harvey v. Alexander, 1 Rand. Va. 241; Fairbanks v. Metcalf, 8 Mass. 230; Hood v. Brown, 2 Ohio, 268; Jackson v. Schoonmaker, 2 Johns. N. Y. 230; Harrington v. Gage, 6 Vt. 532. See Barncord v. Kuhn, 36 Penn. St. 383.

the custom for a long time to insert one. And although a deed is presumed to have been delivered at the time it is dated,⁶⁵ it is always permissible to show the true time of delivery.⁶⁶ And by the delivery the grantor adopts the seal, and, by parity of reason, the signature on the deed.⁶⁷

The delivery may be made by the grantor or his attorney to the grantee or his attorney, by express words or by implication, as absolute or conditional, and the delivery must be voluntary.

2023. The delivery may be made by the *grantor* himself, or by his authorized *agent* or *attorney*. It is not requisite that the attorney should be authorized by writing under seal, or even by writing. The appointment to deliver a deed may be oral, given before the delivery, or the authority of the grantor may be shown by an assent to the act of the attorney.⁶⁸ But to authorize an attorney to deliver a deed, he must pursue the authority given to him, or his act will be invalid;⁶⁹ if, for example, an illiterate grantor were to put a deed in possession of another, with a request that he should read it, and if it granted a certain estate, that he should deliver it to the grantee, and if it granted another, he should return it to him, and the attorney after reading it, found it granted the last mentioned estate, and nevertheless delivered it, such delivery would be void.⁷⁰

2024. The delivery may be made to the *grantee* or to any one authorized by him;⁷¹ or it may be made to a stranger for and on behalf of the grantee, without any authority; and, in this case, the grantee may confirm the delivery at any time by accepting the deed.⁷² But if it be delivered to a stranger without authority, and without any subsequent sanction, the delivery is not sufficient, unless the deed be delivered as an escrow.

2025. An *express delivery* is where the grantor or his attorney puts the deed in the possession of the grantee or his attorney with a view of giving it effect. This is usually done at the time the parties settle, and when the purchase money is paid or secured to be paid.

2026. An *implied* or *constructive delivery* is one which takes place by acts from which it is presumed the grantor intended to deliver the deed and the grantee to accept it. The books contain numerous cases of this kind; as, where a deed was put in the post-office by the grantor, and directed to the grantee;⁷³ when the parties met, read, signed, and acknowledged a deed before an officer, which was afterward recorded;⁷⁴ or where the registry of a deed was made at the request of the grantor, for the use of the grantee, and the grantee subsequently assented to the same, this was considered as equivalent to a delivery,⁷⁵ but this is said to be only *prima facie* evidence of it.⁷⁶

⁶⁵ Robinson v. Wheeler, 25 N. Y. 252; McConnell v. Brown, Litt. Sel. Cas. Ky. 459.

⁶⁶ Harrison v. Phillips' Academy, 12 Mass. 456; Geiss v. Ofenheimer, 4 Yeates, Penn. 278.

⁶⁷ Perkins, Conv. § 130; 2 Sharswood, Blackst. Comm. 307.

⁶⁸ Mere possession by the grantee in the absence of other evidence, is sufficient proof of a delivery. Black v. Shreve, 2 Beasl. N. J. 455; Little v. Gibson, 39 N. H. 505; Sadler v. Anderson, 17 Tex. 245.

⁶⁹ Black v. Shreve, 2 Beasl. N. J. 455; Smith v. South Royalton Bank, 32 Vt. 341; Everts v. Agnes, 6 Wisc. 453.

⁷⁰ Sheppard, Touchst. 57.

⁷¹ Cincinnati v. Iliff, 13 Ohio St. 235.

⁷² Buffum v. Green, 5 N. H. 71; Hulloch v. Bush, 2 Root, Conn. 26; Church v. Gillman, 15 Wend. N. Y. 656; Cuning v. Pinkham, 1 N. H. 353; Turner v. Whidden, 22 Me. 121; Woodbury v. Fisher, 20 Ind. 387; Marsh v. Austin, 1 All. Mass. 235; Bennett v. Waller, 23 Ill. 97.

⁷³ McKinney v. Rhodes, 5 Watts, Penn. 343.

⁷⁴ Scrugham v. Wood, 15 Wend. N. Y. 545.

⁷⁵ Hedge v. Drew, 12 Pick. Mass. 141.

⁷⁶ Chess v. Chess, 1 Penn. 32. See Maynard v. Maynard, 10 Mass. 456. And as to constructive delivery, see Pennell v. Weyant, 2 Harr. Del. 501; Gilbert v. North Am. Ins. Co.

There are also many other cases of implied delivery arising from the situation of the parties, acknowledgments made by them, and other circumstances.⁷⁷

2027. A delivery is *absolute* when the deed is delivered to the grantor or his attorney, with a view that it shall take immediate effect, and without any condition whatever. And if it be delivered to the grantee on a certain contingency, the condition is a nullity, and the delivery is absolute.⁷⁸

2028. The deed may be delivered *conditionally* to a third person, either to be delivered to the grantee without condition, when the rights of the grantee to the deed immediately attach, or it may be delivered as an escrow.

An *escrow* is a conditional delivery of a deed to a stranger until certain conditions shall be performed, to be then delivered to the grantee. At the time of the delivery the condition to be performed must be distinctly stated; as, "I deliver to you this deed for A, upon condition that he shall pay you for me one thousand dollars before you deliver it to him."⁷⁹ Until the condition has been performed and the deed delivered over the estate does not pass, but remains in the grantor.⁸⁰

In general, an escrow takes effect from the second delivery, and is to be considered as the deed of the party from that time; but this general rule does not apply when justice requires a resort to fiction. In a case where a single woman had made a deed and delivered it as an escrow, and between the time of the delivery and the performance of the condition she married, in order to prevent injustice the delivery was, by a fiction of law, considered as having been made when she delivered the deed as an escrow.⁸¹

2029. But a distinction must be observed between the delivery of a deed as an escrow and its delivery to a stranger, to be delivered to the grantee upon the happening of a future event; for example, where the grantor delivers the instrument as his deed to a third person, to be delivered over to the grantee when he shall return from Europe, the deed is valid from the beginning, and the third person is but a trustee of it for the grantee.⁸²

2030. No contract whatever can take place without the assent of the parties to it. When a deed is obtained by the grantee, or any one else, from the grantor, *without his consent*, it is clear that there is no delivery. If, therefore, a grantor should by mistake deliver one deed for another, the delivery would be invalid; but, in such case, the grantor would be required to prove the mistake by very clear testimony.

With greater reason will a delivery of a deed be void where the grantor has been forced by menace, threats, or duress to deliver it.

2031. After the deed has been properly made, executed, and delivered, there is still to be performed another act to give it complete validity, not as between the parties, for the grantor is estopped from denying his deed upon its production, but as between the purchaser and third persons. It has been already

23 Wend. N. Y. 43; Green v. Yarnall, 6 Mo. 326; Dunn v. Games, 1 McLean, C. C. 321; Hatch v. Haskins, 17 Me. 391; Hannah v. Swarner, 8 Watts, Penn. 9; Moore v. Collins, 4 Dev. No. C. 384.

⁷⁷ Tucker v. Bradley, 33 Vt. 324; recording, Phelps v. Phelps, 17 Md. 120; Balbec v. Donaldson, 2 Grant, Cas. Penn. 459; Prettyman v. Goodrich, 23 Ill. 330; Airey v. Holmes, 5 Jones, No. C. 142. See contra, Berkshire Co. v. Sturgis, 13 Gray, Mass. 177. That recording is *prima facie* evidence open to explanation. Boardman v. Dean, 34 Penn. St. 252; Bullit v. Taylor, 34 Miss. 78; Thompson v. Jones, 1 Head, Tenn. 574.

⁷⁸ Foley v. Cowgill, 5 Blackf. Ind. 18; Sheppard, Touchst. 59.

⁷⁹ Sheppard, Touchst. 59.

⁸⁰ Perk. § 137, 138; Sheppard, Touchst. 59; Jackson v. Catlin, 2 Johns. N. Y. 248; 5 Mas. C. C. 60; Johnson v. Baker, 4 Barnew. & Ald. 440.

⁸¹ Sheppard, Touchst. 59, 60.

⁸² Sheppard, Touchst. 59; Perkins, Conv. §§ 143, 144; 6 Mod. 217; Wheelwright v. Wheelwright, 2 Mass. 452.

observed that the *recording* of a deed supplies the place of the old livery of seisin, and its being put upon record is notice to all the world; and if after such deed has been recorded the seller should sell again, or mortgage the estate so granted, the subsequent buyer or mortgagee would obtain no title.

Recording acts have been passed in all the states of the Union; and if their provisions are observed, the purchaser will be protected. In some of them the deed may be recorded within a certain time after its execution, some greater, and others a less time, and the recording takes effect by relation from the time when the deed was made. As in Kentucky and Virginia, eight months; in Mississippi, three months; in Delaware, Indiana, Georgia, and Tennessee, twelve months; in Alabama, Maryland, North Carolina, New Jersey, and South Carolina, six months; in Georgia and South Carolina, where both deeds are recorded after the time fixed, the first executed takes precedence; in Illinois, Ohio, New Jersey, and Pennsylvania, the first recorded.⁸⁵ The time is different for deeds and mortgages in some of the above states.⁸⁴

In other states there is no time specified within which a record must be made, but the *bona fide* purchaser who first makes record will have the prevailing title.

2032. Before a deed can be recorded so as to give validity and effect to the record there must be an acknowledgment, or some equivalent act of authentication of the deed, as the free act of the grantor. In some states the lack of an acknowledgment may be supplied by the evidence of attesting witnesses. Married women are in most of the states required to make an acknowledgment separately from their husbands, or at least must be examined separately by the magistrate as to the freedom from undue influence and the voluntary nature of the act. In some states, however, no such acknowledgment is required, but the acknowledgment of the husband, who is a party to the deed, is sufficient.⁸⁵

A record made without compliance with the statutory prerequisites is of no effect; as, if there has been no acknowledgment,⁸⁶ if the deed has not been properly executed,⁸⁷ or if it is not recorded in the proper office.⁸⁸

And the record is notice only of what appears on the record.⁸⁹

2033. Although we have in this country simplified our forms of conveying, and deeds are more brief than they are in England, yet still many of the old forms of deeds are used, sometimes from abundant caution, but generally because such is the practice. A deed might be greatly simplified, as has been well observed by a learned commentator.⁹⁰

⁸⁵ 2 Washburn, Real Prop. 592; Northrup v. Brehmer, 8 Ohio, 392; Applegate v. Gray, 9 Dan. Ky. 397; Martin v. Williams, 27 Ga. 406; Mallory v. Stodder, 6 Ala. 801; Worden v. Williams, 24 Ill. 67.

⁸⁶ Souder v. Morrow, 33 Penn. St. 83; Dall v. Arnold, 2 Bibb, Ky. 65.

⁸⁷ Palmer v. Paine, 9 Gray, Mass. 56.

⁸⁸ Short v. Curlee, 28 Ill. 219; Suter v. Turner, 10 Iowa, 517; Kelsey v. Dunlap, 7 Cal. 160. See Allen v. Moss, 27 Mo. 354.

⁸⁹ Isham v. Bennington Co. 19 Vt. 425; Harper v. Barsh, 10 Rich. Eq. So. C. 149; Meighen v. Strong, 6 Miss. 177; Parret v. Shaubhut, 5 Minn. 323; Galpin v. Abbot, 6 Mich. 17.

⁹⁰ Harper v. Tafley, 35 Miss. 510.

⁹¹ Miller v. Bradford, 12 Iowa, 14; Martin v. Brown, 4 Minn. 282. And only of what properly appears there. McKean Co. v. Mitchell, 37 Penn. St. 269.

⁹² Mr. Chancellor Kent has given the form of a short deed in the 4th vol. of his Com. 461, 4th ed. And in a note he cites from the "North American Review" for October, 1840, p. 313, where is given a copy of an Egyptian deed, in the Greek language, executed in the year 106 B. C., which he commends for brevity. It is not very dissimilar in its terms to the following, which is translated from the "*Droit Civil Musulman*," p. 356: "Praises to God! Before the very illustrious, the most venerated, the learned of the learned, the light of truth, Saïd Ahmad-ben Abd-el-Aziz, Cadi Maleki, sitting at the tribunal of the city of Algiers, the well protected, appeared the very venerable and very honorable Saïd Mohamed

The several parts of a deed conveying real estate are, the premises, the habendum, the tenendum, the reddendum, the conditions, the warranty, the covenants, and the conclusion.

2034. By *premises* is understood all that is contained in a deed which precedes the *habendum*. In this part of the deed are set forth the names of the parties, with their titles and additions; all such deeds, agreements, or matters of fact are recited as are necessary to explain the reasons upon which the contract is founded. Here also are mentioned the consideration on which the deed is made and a correct description of the thing granted.

2035. The *habendum*, to have, is that part of the deed immediately following the premises in which it is stated what estate the grantee shall have in the thing granted, its duration, and to what use. It sometimes qualifies the estate, so that the general implication of the estate, which, by the construction of law, passes in the premises, may by the habendum be controlled; in which case the habendum may enlarge the estate, but not totally contradict or be repugnant to it.⁹¹

2036. The *tenendum*, to hold, is the next part of a deed. It was formerly used to express the tenure by which the estate granted was holden; but since all freehold tenures were converted into socage, the tenendum is of no further use, even in England, and is therefore joined to the habendum in this manner: "to have and to hold." The words, to hold, have now but little meaning in our deeds.

2037. *Reddendum* is a word used substantively, and is that clause in the deed which immediately follows the tenendum; by the reddendum the grantor reserves something new to himself out of that which he before granted; the formula used for this purpose is "yielding and paying."⁹²

In every good reddendum or reservation these things must concur, namely: The reddendum must be by apt words.

It must be of some other thing issuing or coming out of the thing granted, and not a part of the thing itself, nor of something issuing out of another thing.

It must be of some thing to which the grantor may resort to distrain.

It must be made to the grantors or to some of them, and not to a stranger to the deed.⁹³

Ben Ramdham, shoemaker, residing in the city of Algiers, acting as well for himself as for his sister, the lady Fathma Ben Ramdham, as her attorney, by virtue of a power of attorney, regularly passed before the very illustrious and very powerful Cadi of the city of Blida, has declared before us that he sold the whole of a garden situate in the city of Blida, containing two pairs of oxen, three hundred fruit trees of divers kinds, one hundred and twenty-five orange trees, a dwelling-house composed of four rooms, with the right to take water for twenty-four hours every eight days. The said sale is to convey all the right and property to Saïd Moustapha Ben el Khaznadgi, so that he may enjoy it and have complete ownership, as to him shall seem good; and this in consideration of the sum of 1800 boudjoux, paid in cash. The seller acknowledges to have received from the hands of the said purchaser the said sum, the mention of which in these presents shall be a good and valid acquittance to him. The said sale is made, the parties being agreed, and each of them enjoying all the intellectual faculties, sound of body and mind, such as is required and permitted by law. The very illustrious and most learned Cadi has affixed his revered seal to this contract, after having taken cognizance of it, and caused it to be certified by his assessors, the very honored Saïd Cadour and Saïd Abid, whom may God protect and favor. Dated the first tenth day of the month of Safar, in the year of the egira 1253."

⁹¹ Stockton v. Martin, 2 Bay, So. C. 471; Corbin v. Healey, 20 Pick. Mass. 514; Moss v. Sheldon, 3 Watts & S. Penn. 160; Snell v. Young, 3 Ired. No. C. 379; Hafner v. Irwin, 4 Dev. & B. No. C. 433.

⁹² These words, when used in a lease, constitute a covenant on the part of the lessee to pay the rent. Platt, Cov. 50; 3 Penn. 464; 1 Barnw. & C. 416.

⁹³ See 2 Sharswood, Blackst. Comm. 299; Coke, Litt. 47; Sheppard, Touchst. 80; Cruise, Dig. t. 32, c. 24, s. 1; Dane, Abr. *Reddendum*.

2038. A distinction must be noticed here between a reservation, which is something created at the time of a grant, which is to be rendered to the grantor, and an exception, which is an exclusion of something connected with the thing granted. A grantor reserves a rent which before the lease had no existence; he excepts a particular field of a farm on which he wishes to feed his own cattle.

But the difference will be more apparent by considering the nature of an exception and what is required to make it valid. To make a good exception these things must concur:

The exception must be by apt words, as saving, excepting, etc.

It must be of a part of the thing demised, and not of some other thing.

It must be of a part only, and not of the whole of the thing demised.

It must be of such a thing as is severable from the demised premises, and not of an inseparable incident.

It must be of such a thing as he that accepts may have, and which properly belongs to him.

It must be a particular thing out of a general, and not a particular thing out of a particular thing.

It must be particularly described and set forth; a lease of a tract of land, except one acre, would be void, because that acre was not particularly described.⁹⁴

2039. Following the *reddendum* comes the clause containing *the conditions*. This subject has been fully considered under the title of contracts.⁹⁵

2040. The ancient English law relating to *warranties* of land was full of subtleties and intricacies. It occupied the attention of the most eminent writers of the English law, and it was declared by Lord Coke that the learning of warranties was one of the most curious and cunning learnings in the law, but it is now of little use, even in England. The warranty was a covenant real by which the grantor of an estate of freehold and his heirs were bound to warrant the title, and either upon voucher, or judgment in a writ of *warrantia charta*, to yield other lands to the value of those from which there had been an eviction by title paramount.⁹⁶ The heir of the warrantor was bound only on condition that he had as assets other lands of equal value by descent.

2041. Warranties were lineal and collateral.

Lineal when the heir derived title to the land warranted, either from or through the ancestor who made the warranty.

2042. Collateral warranty was when the heir's title was not derived from the warranting ancestor, and yet it barred the heir from claiming the title from any collateral title upon the presumption that he might thereafter have assets by descent from or through the ancestor; and it imposed upon him the obligation of giving the warrantee other lands in case of eviction, provided he had assets.⁹⁷

The statute of 4 Anne, c. 16, annulled these collateral warranties which had become so great a grievance.

2043. Warranty in its original form it is presumed has never been known in the United States. The more plain and pliable form of a covenant has been adopted in its place; and this covenant, like all other covenants, has always been held to sound in damages, which after judgment may be recovered out of the personal or real estate as in other cases.

2044. The next clause contains the *covenants*. These are introduced to

⁹⁴ Woodfall, Landl. & T. 10; Coke, Litt. 47, a; Sheppard, Touchst. 77.

⁹⁵ Before, 730, *et seq.*

⁹⁶ Coke, Litt. 365; Sheppard, Touchst. 181; Bacon, Abr. *Warranty*.

⁹⁷ 2 Sharswood, Blackst. Comm. 301, 302.

oblige the parties, or one of them, to do something beneficial to or to abstain from something which if done might be prejudicial to the other.

It is upon the undertakings contained in the covenants that the purchaser must rely for his remedy against the grantor in case of any defect in the title or incumbrance. There is no implied warranty of title arising from the sale of real estate except such as may be implied from the terms of the conveyance. If these do not impose any obligation upon the grantor, in the absence of fraud, the grantee is without remedy at law or in equity.⁹⁸ Covenants are express or implied.

2045. *An express covenant in a deed is an agreement by which the covenantor undertakes positively and directly to do or not to do something.*

The usual personal express covenants inserted in a conveyance of the fee are assertory; as, that the grantor is lawfully seised, that he has a good right to convey, and that the land is free from incumbrances. If the facts be not so, these covenants are broken the moment the deed is delivered. Or such covenants are promissory; as, that the grantee shall quietly enjoy, and that the grantor will warrant and defend the title against all lawful claims. The first are purely personal, and the latter are in the nature of real covenants running with the land conveyed; they descend to heirs, and vest in assignees of the purchaser.

Of the above, the covenants of seisin and right to convey are considered as substantially the same.⁹⁹ The covenants for quiet enjoyment and for further assurance are rarely used in this country, though in some states the former is in use,¹⁰⁰ and in some the latter.¹⁰¹

Express covenants may also be introduced that the grantee will do certain things; as, when houses and lands are demised, the lessee may covenant that he will do repairs and pay the rent. These covenants, as well as the promissory covenants of the grantor, run with the land;¹⁰² that is, are such as affect

⁹⁸ *Brandt v. Foster*, 5 Iowa, 292; 2 Washburn, Real Prop. 696.

⁹⁹ *Griffin v. Fairbrother*, 10 Me. 91; *Raymond v. Raymond*, 10 Cush. Mass. 134; *Brandt v. Foster*, 5 Iowa, 294; *Brady v. Spurck*, 27 Ill. 478. Contra, *Richardson v. Dorr*, 5 Vt. 21.

¹⁰⁰ *Knapp v. Marlboro'*, 34 Vt. 255; *Burton v. Reeds*, 20 Ind. 87; *Ingersoll v. Hall*, 30 Barb. N. Y. 392.

¹⁰¹ *Bennett v. Walker*, 23 Ill. 97; *Foote v. Burnet*, 10 Ohio, 317.

¹⁰² The following are instances of covenants running with the land: A covenant of warranty. *De Chaumont v. Forsythe*, 2 Penn. 507; *Suydam v. Jones*, 10 Wend. N. Y. 180; *Sprague v. Baker*, 17 Mass. 586; *Williams v. Witherbee*, 1 Aik. Vt. 233; *Mitchell v. Warner*, 5 Conn. 497; *King v. Kerr*, 5 Ohio, 156; *Williams v. Beeman*, 2 Dev. No. C. 483.

A covenant for quiet enjoyment. *Markland v. Crump*, 1 Dev. & B. No. C. 94. And see *Knapp v. Marlboro'*, 34 Vt. 255.

A covenant that neither grantor nor his heirs shall make a claim to the land conveyed. *Fairbanks v. Williamson*, 7 Me. 96; *Nunnally v. White*, 3 Metc. Ky. 584.

A covenant of seisin, in some states. *Kingdon v. Nottle*, 1 Maule & S. 355; 4 *id.* 53; *Martin v. Baker*, 5 Blackf. Ind. 232; *Devore v. Sunderland*, 17 Ohio, 52; *Maine Rev. Stat.* 1857, ch. 82, § 16. But not so in others. *Slater v. Rawson*, 1 Metc. Mass. 450; 6 *id.* 439; *Beddoe v. Wadsworth*, 21 Wend. N. Y. 120; *Fitzhugh v. Croghan*, 2 J. J. Marsh. Ky. 429; *Dickinson v. Hoopes*, 8 Gratt. Va. 353.

A covenant that the grantor is indefeasibly seised. *Parker v. Brown*, 15 N. H. 176; *Mills v. Catlin*, 22 Vt. 106; *Brandt v. Foster*, 5 Iowa, 294; *Lockwood v. Sturdevant*, 6 Conn. 374.

A covenant for further assurance. *Foote v. Burnet*, 10 Ohio, 317; *Armstrong v. Darby*, 26 Mo. 517; *Funk v. Cresswell*, 5 Iowa, 62; *Colby v. Osgood*, 29 Barb. N. Y. 339; *Bennett v. Walker*, 23 Ill. 97.

A covenant to maintain fences. *Duffy v. New York R. Co.* 2 Hilt. N. Y. 496; *Kellogg v. Robinson*, 6 Vt. 276.

A covenant by a tenant to occupy and leave the premises in tenantable repair at the expiration of his term. *Shelby v. Hearne*, 6 Yerg. Tenn. 512.

A covenant to repair. *Demarest v. Willard*, 8 Cow. N. Y. 206; *Pollard v. Shæffer*, 1 Dall. 210; *Norman v. Wells*, 17 Wend. N. Y. 148.

the land not only in the hands of the original party, but his heirs and assigns; so that he who has the land is subject to the covenant.¹⁰³ But the assignee is not liable for a breach committed before his time.¹⁰⁴

2046. An *implied covenant* is one which is raised by operation of law from the acts of the parties.

By statutory provision in Pennsylvania, Alabama, Delaware, Illinois, Indiana, Mississippi, and Missouri, the words grant, bargain, and sell in conveyances in fee, unless restrained specially, amount to a covenant that the grantor was seised of an estate in fee, freed from incumbrances done or suffered by him, and for quiet enjoyment as against his acts.¹⁰⁵

There are many other instances of implied covenants not arising from the words of any statute;¹⁰⁶ as, for example, where a lessor grants or demises to his lessee a house or lands for a certain term, there is an implied covenant against incumbrances.¹⁰⁷ And the words grant,¹⁰⁸ grant and demise,¹⁰⁹ demise,¹¹⁰ are so many instances of implied covenants; and yielding and paying in a lease is an implied covenant that the tenant will pay the rent.¹¹¹ Lease,¹¹² lease and demise.¹¹³

2047. The *conclusion* is the last part of the deed. This mentions the execution and the date, either expressly or by reference to the beginning.

A mistake in the date will not vitiate a deed, as it is not a substantial part of it;¹¹⁴ and if there be an impossible date, as the 32d day of January, it will be equally immaterial.

2048. The form of conveyances was modified, as has been before stated, by the statute of uses, and in modern times other statutory provisions have induced still greater changes, especially in this country. As, however, the modern forms are derived from ancient ones, and the modifications consist mainly in leaving out parts which have become useless, or in combining portions of the different forms, it will be both profitable and interesting to examine briefly some of the forms which have been in frequent use.

Considering first the forms of conveyance before the statute of uses we shall examine the following, viz.: feoffment, grant, exchange, partition, lease, surrender, release, confirmation, defeasance, and assignment. We shall consider subsequently forms under the statute of uses.

2049. *Feoffment*, by the ancient law, strictly and properly was the transfer of any houses, messuages, lands, or other corporeal and immoveable things of like nature, which are hereditary, to another in fee simple, that is, to the feoffee and his heirs for ever, by delivery of seisin and possession of the thing given.

This mode of conveyance, prior to the time of Charles II, was not required to be in writing, but might be accomplished by a simple entry upon land in

A covenant to make payment. *Hurst v. Rodney*, 1 Wash. C. C. 375; *Sandwith v. De-silver*, 1 Browne, Penn. 221.

A covenant to erect buildings in a common or public square, owned by the grantor, in front of the premises conveyed. *Waterton v. Cowen*, 4 Paige, Ch. N. Y. 510.

¹⁰³ Bacon, Abr. *Covenant*, E.

¹⁰⁴ Comyn, Dig. *Covenant*, B. 3.

¹⁰⁵ For the construction of these words, see *Grantz v. Ewalt*, 2 Binn. Penn. 25; *Roebuck v. Duprey*, 2 Ala. N. S. 535; *Brown v. Tomlinson*, 2 Greene, Iowa, 527; *Alexander v. Schreiber*, 10 Mo. 460; *Hawk v. McCulloch*, 21 Ill. 220; *Finley v. Steele*, 23 id. 56.

¹⁰⁶ Bacon, Abr. *Covenant*, B.

¹⁰⁷ Coke, Litt. 384.

¹⁰⁸ 1 Mod. 113; *Freem*, 367; 4 Taunt. 609.

¹⁰⁹ *Barney v. Keith*, 4 Wend. N. Y. 502; *Grannis v. Clark*, 8 Cow. N. Y. 36.

¹¹⁰ *Crouch v. Fowle*, 9 N. H. 219; 4 Coke, 80.

¹¹¹ *Kimpton v. Walker*, 9 Vt. 191.

¹¹² *Ross v. Dysant*, 33 Penn. St. 452; *Hammond v. Wright*, 28 Mo. 199. But see *Lovering v. Lovering*, 13 N. H. 513.

¹¹³ *Dexter v. Manley*, 4 Cush. Mass. 24; *Wade v. Halligan*, 16 Ill. 507; *Mayor v. Mabie*, 13 N. Y. 157; *Baughner v. Wilkins*, 16 Md. 35. See *Black v. Gilmore*, 9 Leigh, Va. 446.

¹¹⁴ *Jackson v. Schoonmaker*, 2 Johns. N. Y. 235.

the presence of witnesses, and the delivery of some symbol, as the key of the house, a turf or twig, with appropriate words of transfer, of which give was the aptest, though grant was sufficient.¹¹⁵

A deed or charter of feoffment was, however, early adopted as a convenient mode of preserving evidence of the feoffment. By referring to the form of deed or charter of feoffment it will be seen that it has furnished the outline of the common form of conveyance in many of the states.¹¹⁶ This form of deed came to be used for the conveyance of less estates than fee simple, so that unless it was expressly limited to the heirs of the feoffee a life estate merely passed.

The term gift was used to designate that class of feoffments in which an estate tail was created.¹¹⁷

The feoffment was accompanied by livery of seisin. This operated upon the possession without regard to the estate or interest of the feoffor; when he had a fee it passed a fee, of course; but if he had a mere naked or even a tortious possession, the feoffment still passed a fee on account of the livery of seisin, and actually operated as a disseisin of the freehold.

The party making the feoffment was called the feoffor; he to whom it was made, the feoffee.

The conveyance by feoffment, with livery of seisin, has long since become obsolete in England, and in this country, though the word enfeoff is frequently used in deeds of bargain and sale, it has not been used in practice.

2050. Technically speaking, *grants* are applicable to the conveyance of incorporeal rights only, though in its largest sense the term comprehends everything which is conveyed or passed from one to another, and it is applied to the transfer of every species of property. Grant is one of the words commonly used in a deed of bargain and sale, and differs but little from it except in the subject matter; for the operative words, in grants, are *dedi et concessi*, "have given and granted." In a treaty, by the word grant is meant not only a formal grant, but any concession, warrant, order, or permission to survey or settle. Such a grant may be made by law, as well as by a patent pursuant to a law.¹¹⁸

Grant is also used as a general term including any species of transfer or conveyance; as, feoffments, bargains and sales, gifts, leases, or even by word without writing.¹¹⁹

The person who makes the grant is called the grantor, and he to whom it is made, the grantee.

2051. Incorporeal rights are said to lie in grant and not in livery, for, exist-

¹¹⁵ Coke, Litt. 9, 42; 2 Blackstone, Comm. 310; Sheppard, Touchst. 203.

¹¹⁶ 2 Blackstone, Comm. App. I. Mr. Walker, of the Charleston bar, in a very ingenious pamphlet entitled "An Inquiry into the use and authority of Roman Jurisprudence in the law concerning real estate," says, page 33: "The feoffment could only be made in open court—*coram paribus curiæ*. Its effects were very important. The right to the land was in some sort *res judicata*, not only against the feoffor, but also against all *pares curiæ*—indeed the latter were the judges of the feoffor's ability to make the feoffment." 4 Cruise, 47, s. 25. The *pares* were freeholders, bound to attend that court. Hence all persons interested were present, consenting or in default, and in either case concluded by the determination of the court. This is the reason that the feoffment 'cleareth all disseisins, abatements, intrusions, and other wrongful or defeasible estates.' He compares it to the *cessio in jure*, which was a form of conveyance in common use in Rome. To make a feoffment, it was required that there should be a feoffor and a feoffee, and that the contract should be completed by means of the court. In Rome, a party appeared before a judge at the *forum rei sitæ*, and no where else, and demanded of another a certain piece of land; the latter by agreement did not resist; the judgment was immediately given for the former, and he was put into possession. A contract of this kind was called a *transactio*, and such also is the Latin synonym of feoffment completed. When the feoffment is made in a court of record it is termed a fine or common recovery."

¹¹⁷ 2 Blackstone, Comm. 317.

¹¹⁸ Struther v. Lucas, 12 Pet. 410.

¹¹⁹ 3 Wood, Conv. 7; 2 Washburn, Real Prop. 605.

ing only in idea, in contemplation of law, they cannot be transferred by livery of seisin; at common law a conveyance in writing was necessary to pass an incorporeal hereditament; hence it is said that incorporeal hereditaments lie in grant, and pass by the livery of the deed, in contradistinction to a feoffment which might have been made orally with livery of seisin, and it was this livery which operated upon the estate.

2052. There were other distinctions between a feoffment and a grant. The former operated upon the possession and cleared away all divested estates, all defeasible titles, destroyed contingent remainders, extinguished all powers, and barred the feoffor from all future right, or possibility of right, to the land, and vested an estate of freehold in the feoffee when the entry of the feoffor was lawful.¹²⁰ The latter operated only on the estate or interest the grantor had in the thing granted, and which he could lawfully convey.¹²¹

2053. By the common law, when the lord granted his seigniorship without the consent of the tenant, or when he granted a rent, in order to render the grant effectual, it was required that the tenant should express his consent to it; this was called an attornment.¹²² Attornments are rendered unnecessary, even in England, by sundry statutes. They are entirely abolished in the United States.

2054. *Exchange* is another mode of conveying real estate. It is a mutual grant of equal interests in land, the one in consideration of the other.¹²³ Since the statute of frauds all exchanges of land must be made in writing.

There are five requisites to a good exchange, without which it cannot exist: that the estates given be equal; that the word exchange be used, for this cannot be supplied by any other word, nor the estate described by any circumlocution; that there be an execution by entry or claim in the lifetime of the parties; that it be of a thing which lies in grant, if it be by deed; and that if the lands lie in several counties, it be by deed indented, or if the things lie in grant, though they be in one county.

2055. It is only necessary that the *equality* be in the quantity of the estates exchanged; as, an estate in fee for an estate in fee; an estate for life for an estate for life; but this equality does not refer to the value, quality, or manner of the estate.¹²⁴ An estate in joint tenancy may therefore be exchanged for an estate held in common; for the same reason, lands may be exchanged for rents, commons, or any other inheritances concerning lands.

2056. Proper technical words must be used, for no circumlocution will supply the word *escambium*, or exchange; from this arises an implied warranty.

An exchange may be made by lease and release, and then the statute of uses executes the possession without entry, and all the incidents annexed to an exchange at common law are still preserved.

2057. The exchange must be executed *in the lifetime of the parties*; for as livery of seisin is not required, the parties have no freehold in deed nor in law, in them, till entry. When both parties die before the entry of either, the exchange will, therefore, be void; but if one enters, and the other dies before entry, his heirs may enter. When the exchange is made by lease and release, this inconvenience is avoided.

2058. Formerly, an exchange could be made orally, when the subject of it was not an estate lying in grant, and it was all in one county; when the thing was lying in grant, or the lands were in different counties, it required a deed. Since the statute of frauds the exchange must be by deed.¹²⁵

¹²⁰ Sheppard, Touchst. 203, 204.

¹²¹ Litt. §§ 608, 609.

¹²² Coke, Litt. 309; Sheppard, Touchst. 253.

¹²³ 2 Sharswood, Blackst. Comm. 323; Sheppard, Touchst. 289; Litt. § 62.

¹²⁴ Litt. § 64, 65.

¹²⁵ See Sheppard, Touchst. 294.

2059. It is said that exchange in this country does not differ from bargain and sale;¹²⁶ and in a case where A and B agreed to exchange their farms, and each conveyed his farm nominally for a consideration, the wife of A, who had not joined in the conveyance, was held to be entitled to dower in both farms, this not being technically an exchange.¹²⁷

2060. *Partition* is the division which is made between several persons of lands, tenements, or hereditaments, or of goods and chattels which belong to them, jointly or in common, as co-heirs or co-proprietors.¹²⁸ The term is more technically applied to the division of real estate made between coparceners, joint tenants, or tenants in common. This may be done by an instrument called a deed of partition, by which distinct parts of the estate are allotted to the several parties who take them in severalty.

In the ancient deeds of partition it was merely agreed that one should enjoy a particular part and the other another in severalty, but now it is usual for the parties mutually to assure to each other the different estates which they are to take in severalty under the partition. In order to make a valid voluntary partition it must be by deed.

Between coparceners when partition is made there is an implied warranty, because they could be compelled to make partition.¹²⁹

2061. In treating of an estate for years, it may be remembered, the nature of a *lease* was fully considered. This will dispense with a further examination here.¹³⁰

2062. A *surrender*, technically speaking, is the yielding or delivering up of lands or tenements and the estate a man has therein unto another who has a higher and greater estate in the same lands or tenements, but it is sometimes applied to other things.¹³¹ A surrender is of a nature directly opposite to a release; for as the latter operates by the greater estate descending upon the less, the former is the falling of a less estate into a greater by deed.

The instrument by which the conveyance is made is also called a surrender; he who makes it is the surrenderor; and he to whom it is made is the surrenderee.

2063. To make a valid surrender of land the following circumstances are required:

That the surrenderor be a person able to make a grant or surrender, and the surrenderee a person able to receive such a surrender.

That the surrenderor have, at the time of making it, an estate in possession of the thing surrendered, and not a bare right to it; and the person to whom the surrender is made must have a greater estate immediately, either in remainder or reversion, in which the estate surrendered may merge. For example, if a lessee for life or years be ousted by a stranger, and, while thus out of possession, surrenders to his lessor, the surrender is void, because he had but a right at the time of the surrender.¹³²

There must at the time be a privity of estate between the parties.¹³³

That the surrender be by deed and by proper words. The expressions used

¹²⁶ 4 Dane, Abr. c. 114, n. 30; Oliver, Conv. 248.

¹²⁷ Cass v. Thompson, 1 N. H. 65.

¹²⁸ See Cruise, Dig. t. 32, c. 6; 2 Sharswood, Blackst. Comm. 323; Bacon, Abr. *Coparceners* (C); Bacon, Abr. *Joint tenants* (J). As to compulsory partition, see Miller, Part.; Comyn, Dig. *Pleader*, 3, F, *Parcener*, c; 17 Viner, Abr. 217; La. Civ. Code, B. 3, t. 1, c. 8; 4 Kent, Comm. 364.

¹²⁹ Weiser v. Weiser, 5 Watts, Penn. 279; Coke, Litt. 173, b; Cruise, Dig. t. 32, c. 6, § 17.

¹³⁰ Before, 1778.

¹³¹ Sheppard, Touchst. 300; Coke, Litt. 337, b.

¹³² Perkins, Conv. §§ 599, 600.

¹³³ Plowd. 541; Sheppard, Touchst. 303.

in a release or quit claim may be sufficient, but the proper technical words are surrender and yield up.¹³⁴

2064. A surrender of a lease *by operation of law* takes place where the lessee does some act, or is a party to the doing of some act of notoriety totally inconsistent with the continuance of his lease, and which would be an invalid act if the lease continued to exist. For example, if a lessee for years accept a new lease from his lessor, the acceptance of such new lease is of itself a surrender of the former lease.¹³⁵

2065. A surrender immediately *divests* the estate out of the surrenderor and vests it in the surrenderee, for in this case no other is required but the bare grant of the surrenderor. It is true, indeed, that a grant is a contract, and that there must be *actus contra actum*, or a mutual consent; in this case, however, the consent is implied, for a gift imports a benefit, and an assent to it may be fairly presumed.¹³⁶

The effect of the surrender between the parties is complete and the estate is merged, but it is not so with regard to strangers whose rights are preserved; as, if a lessee for life make a lease for years rendering rent, and the lessee for life surrender his estate. Here, although the life estate be surrendered, yet the lease for years shall be good; but the surrenderee shall not have the rent reserved upon the lease for years.¹³⁷

2066. The word *release* has several meanings. It signifies, in the first place, the giving up or discharging of a right of action which a man has or claims to have against another, or that which is his;¹³⁸ and, in the second place, it means "a conveyance of a man's interest or right which he hath unto a thing to another that hath the possession thereof, or some estate therein."¹³⁹ It is here used only in the latter sense. A release, as has been before observed, is the reverse of a surrender. It transfers the greater estate of a man out of possession to the releasee who is in possession. An example will make this manifest: Where a man is disseised, the disseisor acquires the possession, and the right of possession and of property remains in the disseisee. Now if the disseisee agrees to convey his right to the disseisor, the proper mode of carrying such an agreement into execution is by a release.

He who makes a release is called a releasor, and he to whom it is made is the releasee.

2067. The words generally used in a release are, "remised, released, and forever quit claimed."¹⁴⁰ When the words are to raise an estate, it is usual and most safe to specify what estate the releasee shall have. This is requisite in most cases, for when a release inures by way of enlargement of the estate, no estate in fee simple will pass without words of inheritance. If, therefore, Peter make a lease to Paul, and afterward, Peter makes a release to Paul of all his right, without saying more, the estate is not thereby enlarged.¹⁴¹

2068. A release may *inure* in various ways, the principal of which are the following:

By way of passing the estate, or *mitter l'estate*. When two or more persons become seised of the same estate by a joint title, either by contract or by descent, as joint tenants or coparceners, and one of them releases his right to the

¹³⁴ Perkins, Conv. § 607; Comyn, Dig. *Surrender*, A.

¹³⁵ Doe v. Forward, 3 Q. B. 638. See as to surrenders by operation of law, Mathew, Pres. ch. 13, p. 236; Addison, Contr. 658-661.

¹³⁶ Bouvier, Law Dict. *Assent*.

¹³⁷ Sheppard, Touchst. 301.

¹³⁸ Sheppard, Touchst. 320; Bacon, Abr. *Release*; Coke, Litt. 264, a.

¹³⁹ Sheppard, Touchst. 320.

¹⁴⁰ Sheppard, Touchst. 320.

¹⁴¹ Sheppard, Touchst. 327.

other, such release is said to inure by way of *mitter l'estate*, and this passes the fee simple to the whole.¹⁴³

By way of passing the right, or *mitter le droit*; as, where the disseisee releases to the disseisor, or to the heir or feoffee of the disseisor, who, being in possession, is capable of taking a release of the right; as in cases of this kind nothing but the bare right passes, the release is said to inure by way of *mitter le droit* or passing the right.¹⁴³

By way of enlarging the estate, or *enlarger l'estate*; as, when right and the possession are separated for a particular time; and he who has the reversion and inheritance releases all his rights and interests in the land to the person who has the particular estate. A release of this kind is said to inure by way of enlarging the estate, and to amount to a grant and an attornment. To render this release good, it is requisite there should be a privity of estate between the releasor and the releasee, and also that the releasee should have such an estate as is capable of being enlarged.¹⁴⁴

By way of extinguishment; as, if my tenant for life makes a lease to A for life, remainder to B and his heirs, and I release to A, this extinguishes my right to the reversion, and shall inure to the advantage of B's remainder as well as of A's particular estate.¹⁴⁵

2069. All interests, rights, and profits arising out of or annexed to the land may be released; but a mere possibility cannot be released; thus the heir apparent of a disseisee cannot release the disseisor, and, if he do, on inheriting the land, he may assert his title. It is said a freehold right or title may be released in five ways:

To the tenant of the freehold, in fact or in law, without any privity,

To the remainder-man.

To the reversioner, without privity.

To one having a right only by privity.

To one having a privity only, without a right.¹⁴⁶

2070. The technical principles relating to a release do not appear to be applicable, generally, in this country. A *quit claim deed* has, with us, nearly the same effect as a release at common law; the words which are effective in it are the same as in a release, "release, remise, and quit claim." In these the grantor does not warrant against a paramount or adverse title, but only against himself and those who claim under him.

Deeds of quit claim are recognized as valid in Connecticut, Maine, Massachusetts, Minnesota, and Mississippi, and perhaps other states by statute and in several other states, as common law conveyances.¹⁴⁷

When a deed cannot be supported as a release, the courts will give it effect, by treating it as a confirmation,¹⁴⁸ or as a bargain or sale,¹⁴⁹ if there be no rule of law adverse to such construction.

2071. A *confirmation* is nearly allied to a release. It is defined by Coke to

¹⁴³ Litt. § 304; Coke, Litt. 273, b; Gilbert, Ten. 72.

¹⁴⁴ Litt. § 466; Gilbert, Ten. 55; Sheppard, Touchst. 321.

¹⁴⁵ Cruise, Dig. tit. 32, c. 6, 1, 33.

¹⁴⁶ Litt. § 465; Coke, Litt. 272, b; Sheppard, Touchst. 321.

¹⁴⁷ Lamper's case, 10 Coke, 46; Gilbert, Ten. 53; Coke, Litt. 265, a.

¹⁴⁸ 2 Washburn, Real. Prop. 608; Mass. Gen. Stat. c. 89, §§ 3, 8; Minn. Comp. Stat. 1858, c. 35, § 1; Maine Rev. Stat. c. 73, § 14; Miss. Code, 1857, p. 309, art. 17; Brown v. Jackson, 3 Wheat. 452; Dart v. Dart, 7 Conn. 255; Hall v. Ashley, 9 Ohio, 96; McConnel v. Read, 5 Ill. 117; Bogy v. Shoab, 18 Mo. 380; Kerr v. Freeman, 33 Miss. 292; Jackson v. Fish, 10 Johns. N. Y. 456; Truchard v. Crow, 20 Cal. 150; Webster v. Webster, 33 N. H. 22.

¹⁴⁹ Oakes v. Marcy, 10 Pick. Mass. 195.

¹⁵⁰ Jackson v. Fish, 10 Johns. N. Y. 456; Pray v. Pierce, 7 Mass. 381; Russell v. Coffin, 8 Pick. Mass. 143. But see Carroll v. Norwood, 5 Harr. & J. Md. 158.

be "a conveyance of an estate, or right *in esse*, whereby a voidable estate is made sure and unavoidable, or where a particular estate is increased." ¹⁵⁰

The first part of this definition may be illustrated by the following case, put by Littleton,¹⁵¹ where a person lets land to another for the term of his life, who lets it to another for forty years, by force of which he is in possession; if the lessor for life confirms the estate to the tenant for years by deed, and afterward the tenant for life dies, during the term, this deed will operate as a confirmation of the term for years. As to the latter branch of the definition, where a confirmation operates by way of increasing the estate, it is similar in every respect to a release that operates by way of enlargement, for there must be a privity of estate and proper words of limitation.

He who makes the confirmation is called the confirmor, and he to whom it is made, the confirmee.

2072. The principal *requisites* to a good confirmation are the following:

That there be a good confirmor and a good confirmee, and a thing to be confirmed, as in other grants.

That there be a precedent rightful or wrongful estate in the confirmee, in his own or another's right; or at least he must have possession of the thing which is to be confirmed to him, as a foundation for the confirmation to work upon; for if there be no precedent estate on which the confirmation may work, or the estate be actually void, and not merely voidable, then the confirmation is void, and cannot take effect as a confirmation: *debile fundamentum fallit opus*.

The confirmor must have such an estate and property in the thing respecting which confirmation is made that he may be able to confirm the estate to the confirmee.

The precedent estate must continue until the confirmation is made; as in all cases of voidable estates the confirmation must be made before the estate has been avoided, for otherwise the confirmation will be void.

The precedent estate, and that which is to be confirmed, must be lawful and not prohibited by law.

The confirmation must be made by apt words in the deed or instrument. Though the most proper technical words of a confirmation are ratify, approve, and confirm, yet the words, give and grant, may have the same effect.¹⁵²

2073. There is a distinction in the confirmation of an estate of freehold and an estate less than freehold. The latter may be confirmed in part only, but the former cannot be so confirmed. A confirmation of an estate of freehold, even for one hour, is a confirmation of the whole estate.¹⁵³

When the disseisor has leased for years, the disseisee may confirm the interest of the lessee in part; but this must be done by confirming the land for a part of the time, not by first confirming the lease or the estate of the lessee, and then adding for a part of the time, for that is repugnant to the former confirmation.

A confirmation does not strengthen a void estate. *Confirmatio est nulla, ubi donum precedens est invalidum, et ubi donatio nulla est, nec valebit confirmatio*. For confirmation may make a voidable or defeasible estate good, but cannot operate on an estate void in law.¹⁵⁴ The civil law agrees with this rule, and hence the maxim, *qui confirmat nihil dat*.¹⁵⁵

2074. A *defeasance* is an instrument which defeats the force or operation of

¹⁵⁰ Coke, Litt. 295. See Sheppard, Touchst. 311; Gilbert, Ten. 75; 2 Sharswood, Blackst. Comm. 325.

¹⁵¹ Litt. § 516.

¹⁵² Sheppard, Touchst. 314; Litt. § 531.

¹⁵³ Sheppard, Touchst. 317; Cruise, tit. 32, c. 6, s. 54; Coke, Litt. 297, a.

¹⁵⁴ Coke, Litt. 295. ¹⁵⁵ 8 Toullier, n. 476.

some other instrument, or deed, or estate.¹⁵⁶ That which in the same deed is called a condition, in another deed is called a defeasance.¹⁵⁷

As a general rule, the defeasance must be a part of the same transaction with the conveyance, though the defeasance may be dated after the deed.¹⁵⁸

2075. The principal requisites of a good defeasance are:

That it be made *eodem modo*, as the thing to be defeated is created.

That it recite the deed which is to be defeated correctly; a recital that the deed bears date the first day of May will not defeat a deed bearing date the tenth day of May.

That it be made between the same persons who are parties to the first deed.

That it be made after the making of the first deed, and not before; but if dated before and it be delivered after, it will be sufficient.

That it be made of a thing defeasible.

2076. In common parlance, an *assignment* signifies the transfer of all kinds of property, real, personal, and mixed, and whether the same be in possession or in action. In a more technical sense, and in that in which it is here employed, an assignment is a transfer of a term of years, but it is used to signify the transfer of some particular estate or interest in lands. The deed or instrument which contains the agreement is also called an assignment. The person who makes the assignment is denominated the assignor, and the person to whom it is made, the assignee.

A distinction must be observed between an assignment of a term of years and an underlease. The assignment transfers the whole interest of the assignor, whereas an underlease transfers only a part of the estate, or, if it transfer the whole, it is only for a limited time, less than the assignor has in the same.

2077. The technical words of an assignment are assign, transfer, and set over, but the words grant, bargain, and sell, or any words which show the intention of the parties to make a complete transfer, will amount to an assignment.

2078. As to the things which may be assigned, it may be observed that every estate and interest in lands and tenements may be assigned, and also all present and certain estate or interest in incorporeal hereditaments, as rents and the like; even though the interest be future, as a term of years, to commence at a subsequent period; for the interest is vested *in presenti*, though only to take effect *in futuro*.¹⁵⁹

2079. In a former chapter we considered the nature of uses. But the deeds which arose in consequence of the statute of uses were not then made the subject of inquiry, as they more properly belong to this part of the work. These are bargain and sale, lease and release, covenants to stand seised to uses, deeds to lead and declare uses, and deeds of revocation of uses.

2080. *Bargain and sale* is a contract by which a person conveys his lands to another for a pecuniary consideration. The deed by which such contract is witnessed is also called a bargain and sale. It differs from a gift, which is a transfer of property gratuitously, without any consideration, while a bargain and sale must have a consideration. It is unlike an exchange, which is a transfer of one estate for another.¹⁶⁰

¹⁵⁶ Viner, Abr.; Nelson, Abr.; Bacon, Abr.; Dane, Abr.; Lilly, Reg.; Comyn, Dig. *Defeasance*, *Pleader*, 2 W. 35; 2 Saund. 47, n, note (1); Cruise, Dig. tit. 32, c. 7, s. 25; Shepard, Touchst. 396.

¹⁵⁷ Cruise, Dig. t. 32, c. 7, s. 27.

¹⁵⁸ Harrison v. Phillips' Academy, 12 Mass. 456; Lund v. Lund, 1 N. H. 41; Bodwell v. Webster, 13 Pick. Mass. 413.

¹⁵⁹ Coke, Litt. 214, a.

¹⁶⁰ Ward v. Lambert, Croke, Eliz. 394; Croke, Jac. 127; 1 Vent. 137; 1 Leon, 194; Cheney v. Watkins, 1 Harr. & J. Md. 527.

He who sells is the bargainor, and he to whom the sale is made is called the bargainee.

In consequence of this conveyance a use arises to the bargainee, and the statute of 27 Henry VIII immediately transfers the legal estate and the possession to him. The principles of this statute have been generally adopted in the United States, and this kind of conveyance is the most common in this country.

2081. *The requisites of a bargain and sale are:*

A bargain and sale of land must be in writing or by deed.

The words bargain and sale are not indispensable to this contract, for words equivalent will suffice to make the land pass by way of bargain and sale.

There must be a consideration given, or at least said to be given, for the land.

The deed must be recorded within the time prescribed by the statute law of the state where the land lies, for this is in the place of livery of seisin.¹⁶¹ But a lease for years is not in general required to be recorded, though the statutes of some of the states require that it shall be recorded.

2082. Generally, all things grantable by any other conveyance are grantable by a bargain and sale; and therefore lands, rents, profits, and the like, pass by this conveyance, and of any estate, as a fee simple, an estate for life, or years.¹⁶² When the bargainor has an estate for years only, it will not pass by a deed of bargain and sale, because his estate is not such as enables him to be seised to a use; but an estate less than a fee may pass by bargain and sale, provided the bargainor has a freehold.¹⁶³

2083. In order to avoid the provisions of the statute of uses, 27 Hen. VIII, c. 16, which required that bargains and sales to pass a freehold should be recorded, it occurred to Serjeant Moore soon after the passage of the statute to make a lease and then to release to the tenant, and this mode of conveyance obtained the name of *lease and release*.¹⁶⁴ It is thus contrived: a lease, or rather a bargain and sale, upon some pecuniary consideration, for one year, is made by the tenant of the freehold to the lessee or bargainee. This is good without enrolment, for the statute does not require any enrolment of a term for years, and the bargainor stands seised to the use of the bargainee, and vests in him the use for one year, and immediately the statute annexes the possession. Being then in possession, he is capable of receiving a release of the freehold and reversion, which must be made to the tenant in possession; and accordingly the next day a release is granted to him, which completes his title.

The lease and release, when used as a conveyance of the fee, have, jointly, the operation of a single conveyance. By the recording acts in this country they are generally required to be recorded, and this mode of conveyance is seldom used.

Until recently, Stat. 7 and 8 Vict., c. 106, this was the common mode of conveyance in England, though the necessity of a formal lease had been removed as early as 1841.¹⁶⁵

2084. *A covenant to stand seised to uses* is a species of conveyance which derives its effect from the statute of uses, by which a man, seised of lands, covenants, in consideration of blood or marriage, that he will stand seised of the same, to the use of his child, wife, or kinsman, for life, in tail, or in fee.¹⁶⁶

¹⁶¹ Sheppard, Touchst. 223.

¹⁶² Sheppard, Touchst. 222.

¹⁶³ Cruise, Dig. tit. 32, c. 9, s. 21.

¹⁶⁴ 2 Sharswood, Blackst. Comm. 338; Coke, Litt. 207; Cruise, Dig. tit. 32, c. 11; 2 Preston, Conv. 212; 1 Saund. 251, n. (2); Bacon, Abr. *Lease and Release*.

¹⁶⁵ Williams, Real Prop. 146.

¹⁶⁶ Lilly, Reg.; Cruise, Dig. tit. 32, c. 10; 1 Vern. by Raithby, 40, note.

On executing the covenant the covenantee becomes seised of the use of the land, according to the terms of the use, and the statute immediately annexes the possession to the use. This conveyance has the same force and effect as a common deed of bargain and sale; the great distinction between them is that the former can only be made use of among near domestic relations, for it must be founded on blood or marriage.¹⁶⁷

The technical words to create this conveyance are, covenant to stand seised to the use of A, etc. But other words will have that effect if it appear to have been the intention of the parties to use them for that purpose; the words bargain and sell were held to be sufficient.¹⁶⁸

The principal requisites of a covenant to stand seised to uses are:

That there be a sufficient and proper consideration of blood and marriage, that being the most common and suitable one.

That there be a proper deed.

That the deed contain apt words.¹⁶⁹

2085. In England, when deeds are executed prior to fines and recoveries, they are called *deeds to lead the uses*; when subsequent to fines and recoveries, *deeds to declare the uses*.

2086. *Deeds of revocation of uses* are those by which a revocation of the use is made, by virtue of a power, reserved at the raising of the uses, to revoke such as were then declared, and to appoint others in their stead, which is incident to the power of revocation.

2087. In many of the states of the United States forms of conveyance have been adopted by statute embracing some of the features of different forms of conveyances under the common law, and under the statute of uses. The briefest form is believed to be that of Tennessee, where a deed with general warranty of the following form is sufficient: "I hereby convey to A the following tract of land (description) and I warrant the title against all persons whomsoever."¹⁷⁰

In most of the states the deed of bargain and sale is expressly recognized as a suitable form of conveyance, and makes the basis of the form in common use. And where these are in use, recording is not in general necessary to their validity, and is not necessary in any state, it is believed, except by positive statute, it being held that the enrolment act is not applicable in this country. Where statutory forms are provided these are not exclusive of other forms. It is not possible, within the limits assignable to the subject in accordance with the plan of this work, to give a detailed statement of the customary forms of the several states.¹⁷¹

2088. *Alienations by matter of record* are: by acts of the legislature, and patents, and fines and recoveries.

2089. Grants and concessions have been made by many of the states of the Union, by authority of the legislature, either by public or private laws, under which certain officers have given titles under the name of *patents*.¹⁷² These are very numerous, and made in the different states by virtue of the laws of their respective legislatures. It would be very difficult to detail all their provisions, and it is not within the plan of this work, which professes to examine only general principles and rules, to consider such local matters.

¹⁶⁷ 2 Blackstone, Comm. 338.

¹⁶⁸ Cruise, Dig. t. 32, c. 10, s. 3.

¹⁶⁹ See *French v. French*, 3 N. H. 258; *Jackson v. McKinney*, 3 Wend. N. Y. 233; *Rowlets v. Daniel*, 4 Munf. Va. 473; *Pledger v. David*, 4 Des. Eq. So. C. 264.

¹⁷⁰ 2 Washburn, Real Prop. 608; Tenn. Code, 1858, § 2013.

¹⁷¹ The student is referred to the excellent work of Professor Washburn on the American law of Real Property for more detailed information on this point.

¹⁷² See 2 Hilliard, Real Prop. c. 24, for a detailed account of public grants.

2090. The colonial governments of France and Spain also granted many concessions and titles to land, under special circumstances, to many individuals, and not unfrequently the validity of these claims has been examined in our courts.¹⁷³

2091. The public lands of the United States are generally surveyed in townships of six miles square; these are subdivided into sections of six hundred and forty acres; and the sections into half and quarter sections; and these again into quarter quarter sections. The lines in these cases run north and south, and east and west; when a quarter section is divided, the line runs north and south.

These lands are in some instances directed to be sold at public sale, and then the government grants a patent to the grantee, giving all the title the United States had in the land, with a reservation of a certain proportion of all the gold and silver found there. But, more generally, they are selected by purchasers who enter them at the regular land offices, and after they have been paid for, a patent is granted to the purchaser. But a title to lands, or a grant, (by which is meant not only a formal grant, but a concession,) may be made and confirmed by law, as well as by a patent pursuant to law.¹⁷⁴

A patent is declared by the whole legislation of congress to be the superior and conclusive evidence of legal title.¹⁷⁵ But such a patent cannot effect a pre-existing title.¹⁷⁶ Until the patent issues, the fee is in the government, which, by the patent, passes to the patentee;¹⁷⁷ and if the land is unimproved and wholly unoccupied, it gives legal seisin and constructive possession of all the land within the survey.¹⁷⁸

As the patent is the deliberate act of the government, it is presumed that every thing required to be done before it is granted has been done, and no facts behind the patent will be investigated. It is sufficient that the land is identified; if so, the defect of an entry and survey cannot be taken advantage of at law.¹⁷⁹ But when an elder equitable right is set up, a court of equity may inquire into the preliminary steps.¹⁸⁰

But though the patent has this binding effect, it gives no title unless authorized by law; a patent for lands lying within the Indian territory, which could not be sold under the laws of the United States, would, therefore, be invalid; this, however, would take place only when there was no power to issue it, for if a patent were issued for a tract of land, and a part was within the boundaries authorized to be sold, and part beyond it, such patent would be valid for a part and void as to the rest.¹⁸¹

2092. *Fines and common recoveries* are conveyances of record, and both founded on fictions.¹⁸² The origin of both these conveyances was to avoid the necessity of livery of seisin, and, under the form of a suit or legal proceeding, to obtain the title to the land. Though they have been used in some of the states, these forms of conveyance are nearly obsolete; easier and less expensive modes of making conveyances which have their effect having been substituted.

¹⁷³ See White's New Coll.

¹⁷⁴ *Struther v. Lucas*, 12 Pet. 410.

¹⁷⁵ *Bagwell v. Broderick*, 13 Pet. 436.

¹⁷⁶ *New Orleans v. Armas*, 9 Pet. 236.

¹⁷⁷ *Bagwell v. Broderick*, 13 Pet. 436.

¹⁷⁸ *Peyton v. Stith*, 5 Pet. 485; *Miller v. McIntyre*, 6 Pet. 61.

¹⁷⁹ *Lessee of Brown v. Galloway*, Pet. C. C. 291.

¹⁸⁰ *Boardman v. Lessee of Read and Ford*, 6 Pet. 328; *Vowles v. Craig*, 8 Cranch. 371.

¹⁸¹ *Winn v. Patterson*, 9 Pet. 663; *Patterson v. Jenks*, 2 Pet. 235; *Danforth v. Wear*, 9 Wheat. 673.

¹⁸² *Cruise, Fines*; *Sheppard, Touchst. c. 2*; *Bacon, Abr. Fines*; *Piggot, Preston, Wilson, Bailey, Hands*; *Comyn, Dig. Fines*.

2093. A *fine* is an amicable composition or agreement of a suit, actual or fictitious, by leave of the court, by which the lands in question in such suit become, or are acknowledged to be, the right of one of the parties.¹⁸³ A *fine* is so called because it puts an end, fin, not only to the suit thus commenced, but also to all other suits and controversies concerning the same matter.

2094. The statute of 18 Edw. I, called *modus levandi fines*, declares and regulates the manner in which they should be levied and carried on, and that is as follows:

The party to whom the land is to be conveyed or assured commences an action at law against the other; generally, an action of covenant on a pretended contract by suing out a writ of *præcipe* called a writ of covenant, that the one shall convey the lands to the other, on the breach of which agreement the action is brought. The suit being thus commenced, then follows,

The *licentia concordi*, or leave to compromise the suit which is asked of the court, and granted of course.

The *concord*, or agreement itself, after leave obtained by the court; this is generally an acknowledgment from the deforciant that the lands in question are the lands of the complainant.

The *note* of the fine, which is only an abstract of the writ of covenant and the concord, naming the parties, the parcels of land, and the agreement.

The *foot* of the fine, or the conclusion of it, which includes the whole matter, reciting the parties, day, year, and place, and before whom it was acknowledged or levied.

2095. The force and effect of a fine were very great; it barred not only those who were parties to the fine and their heirs, but all other persons in the world of full age, of sound memory, and within the four seas, the day the fine levied, unless they put in their claims within a year and a day.¹⁸⁴ But this bar by non-claim was afterward extended to five years.¹⁸⁵

There were four kinds of fines, but the learning in relation to them will not repay the student for his trouble except as a matter of the history of the law.

2096. A *common recovery*¹⁸⁶ is a judgment recovered in a fictitious suit, brought against the tenant of the freehold in consequence of a default made by the person who is last vouched to warranty in such suit.¹⁸⁷

Common recoveries are considered mere forms of conveyance or common assurances. They were invented by ecclesiastics in order to evade the statute of mortmain by which they were prohibited from purchasing or receiving, under the pretence of a free gift, any lands or tenements whatever.

2097. Although a common recovery is a fictitious suit, yet the same mode of proceeding must be pursued and all the forms strictly adhered to which are necessary to be observed in an actual suit. The proceedings are as follows:

The first requisite is, that the person who is to be the demandant, and to whom the lands are to be adjudged, should sue out a writ or *præcipe* against the tenant of the freehold, who is then called tenant to the *præcipe*.

In obedience to this writ, the tenant appears in court, either in person or by his attorney; but, instead of defending the title to the land himself, he calls on some other person, who upon the original purchase is supposed to have warranted the title, and prays that the person may be called in to defend the title which he warranted, or otherwise to give the tenant lands of equal value to

¹⁸³ Coke, Litt. 120; 2 Sharswood, Blackst. Comm. 349.

¹⁸⁴ Stat. 18 Ed. I.

¹⁸⁵ Stat. 4, Hen. VII. See *Jackson v. Smith*, 13 Johns. N. Y. 426; *Lion v. Burtris*, 20 *id.* 483.

¹⁸⁶ Cruise, Dig. tit. 36; 2 Saund. 42, n. 7; Piggot, Com. Rec.; Rey, Des Institutions Judiciaires de l'Angleterre, tom. ii. p. 221.

¹⁸⁷ Bacon, Tracts, 148.

those he shall lose by the defect of his warranty. This is called the voucher, *vocatia*, or calling to warranty.

The person thus called to warrant, who is usually called the vouchee, appears in court, is impleaded, and enters into the warranty, by which he means to take upon himself the defence of the land.

The defendant then desires of the court leave to imparl, or confer with the vouchee in private, which is granted of course.

Soon after the demandant returns into court, but the vouchee disappears and makes default, in consequence of which it is presumed by the court that he has no title to the lands demanded in the writ, and therefore cannot defend them, whereupon judgment is given for the demandant, now called the recoverer, to recover the lands in question against the tenant, and for the tenant to recover against the vouchee lands of equal value in recompense for those warranted him and now lost by his default. This is called the recompense of recovery in value; but as it is customary for the crier of the court to act, who is hence called the common vouchee, the tenant can only have nominal, and not a real, recompense for the lands thus recovered against him by the demandant.

A writ of *habere facias* is then sued out, directed to the sheriff of the county in which the lands thus recovered are situated, commanding the sheriff to give the possession of the lands to the plaintiff; and on the return of the execution of the writ, the recovery is completed. And thus the wary ecclesiastics, always eager for power and wealth, used the forms of the law for the very purpose of defeating the law itself.

2098. The recovery here described is with single voucher; but a recovery may and is frequently suffered with double, treble, or further voucher, as the exigency of the case may require, in which case there are several judgments against the several vouchees.

All the learning in relation to common recoveries is nearly obsolete, as they are nearly out of use. In some of the states of the Union they have occasionally been employed to bar estates entailed, but statutory provisions have been made which facilitate the barring of such estates so as to render common recoveries unnecessary. Indeed, they ought to have been considered a disgrace to any system of law founded on justice and right.

CHAPTER XXVIII.

TITLE TO PROPERTY BY WILL.

- 2100. History of devises.
- 2106-2123. The qualities requisite in a testator.
- 2107-2116. Incapacity from want of knowledge.
 - 2108. Want of mind.
 - 2115. Incapacity from bodily defects.
 - 2116. Incapacity arising from age.
- 2117-2119. Incapacity because the testator is under the power of another.
 - 2118. Married women.
 - 2119. Persons under duress.
- 2120-2122. The time when the disability attaches.
 - 2121. Incapacity arising after the will is made.
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 - 2123. The number of testators.
- 2124, 2125. Qualities requisite in a devise.
 - 2125. The description of the devisee.
 - 2126. What things may be devised.
 - 2130. What estate passes by devise.
 - 2131. The form of wills.
- 2132-2138. The requisites of wills.
 - 2132. When a will must be in writing.
 - 2133. The date of the will.
 - 2135. The signature of the will.
 - 2136. The attestation of the will.
 - 2137. The publication of the will.
- 2139-2145. The kinds of wills.
 - 2140. Nuncupative wills.
 - 2142. Mystic wills or testaments.
 - 2143. Olographic testaments.
 - 2144. Codicils.
- 2146-2165. Revocation and annulling of wills.
- 2149-2157. Revocation by act of the testator.
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- 2169-2188. Executors and administrators.

- 2170. Appointment of executors.
- 2171. Who may be an executor.
- 2172-2178. Kinds of executors.
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- 2175. Instituted and substituted executors.
- 2177. Rightful and wrongful executors.
- 2179-2182. The number of executors.
- 2180. Interest of joint executors.
- 2181. Liability for acts of co-executor.
- 2182. Rights of surviving executor.
- 2183. What interest executors have in the estate.
- 2186. Powers and duties of executors.
- 2188. Liabilities of executors.

2099. Having considered the mode of acquiring property by descent; by escheats; by forfeiture; by merger; and by alienations by deeds at common law and under the statute of uses; and by matter of record; it now remains to be ascertained, lastly, how property is acquired by will or devise.

As wills generally relate to all a man's property or estate, real or personal, it will be requisite, in order to do justice to the subject, to treat as well of personal as of real estate.

This subject will be considered by taking a view of the history of devises and the power of making wills; the qualities requisite in a testator; the qualities and description requisite in a devisee; the thing devised, and what estate is devised in the same; the form and requisites of wills; the kinds of wills; the revocation of wills; the republication of wills; and of executors and administrators.

2100. A will is the legal declaration of a man's intentions of what he wills to be performed after his death. The terms will and testament are synonymous, and they are used indifferently, or one for another, by common lawyers. When a will operates upon personal property it is simply called a will or testament; when upon real estate, a devise, though devise sometimes signifies the estate given by the will, and not the will itself. The definition of the civil law corresponds with the above; a will by that law is declared to be as follows: *Testamentum est voluntatis nostræ justa sententia de eo quod quis post mortem suam fieri velit.*¹

2101. A testamentary disposition being an act by which the testator disposes of his estate during a time when he shall no longer exist, it may be well inquired, Whence does man acquire this right of empire, which extends beyond his life, over property which no longer belongs to him? Does he derive this authority from nature, or from the civil or municipal law?

This question, so often and so variously agitated by different authors, will not be found difficult to resolve when we reflect on the origin of property. We have seen that before the establishment of the civil estate, property was inseparable from possession; that, in fact, it was only the right to enjoy it while it was possessed, and that as soon as the party ceased to possess, the thing became subject to the use of the first occupant.

In such a state of things it is evident that the mere will of the possessor was not sufficient to transfer his right to another. It could be transferred only by delivery or putting the party in possession. There could then exist no other testaments than those of a gift *causa mortis*, accompanied by delivery, revocable on the recovery of the donor.

2102. When the right to property became permanent, that is, when the

¹ Dig. 28, 1, 1.

owner acquired the right, by the municipal law, to recover from a new possessor the possession which he had lost, he could then transmit this right by an agreement with another person whom he put in his place; but this faculty could not extend beyond his life. It seems like a contradiction that a man should, by preserving all his rights while he is living, still transfer them for a time when he shall no longer exist; that he may transfer a right, not at the present time, but for a time when such a right shall have been lost to him for ever.²

It may be easily conceived that a man may transfer his actual rights, and delay the execution of the agreement until after his death, because, in such case, the moment when the event arises the donee finds himself invested with a right acquired by virtue of the agreement. But it is difficult to conceive that the mere will of a man should create a right in favor of one who knows nothing about the matter, nor concurred, in the lifetime of the testator, by accepting the gift; or that the devisee or legatee should acquire a right, by accepting, after his death, the offers of a man who no longer exists, and whom death has stripped of all his rights.

2103. Either the municipal law has regulated the order of the transmission of property, and then, before the property of the dying owner has passed to those to whom he wished to bestow it, the law has cast the right upon those who have been designated by its provisions; or, the municipal law has not made any provision for the transmission of the property of the deceased, and, in this case, the rights to it are acquired to the first occupant by the right of occupancy, immediately after his death.

The right of making a will, then, is derived from the municipal law, and in most nations, perhaps all over the civilized world, this right exists, regulated and modified according to the municipal laws of each country.

This right was established from motives both public and private. Society would return to chaos and disorder if the estate of every man who dies was subject to become the property of the first occupant. It is then requisite that the law should regulate the manner of transmitting estates from one generation to another.

But as the law cannot designate the individuals of each family who are the most deserving, it has confided this matter to the care of the owner, who must be acquainted with the merit of each one of those dependent on him.

2104. The power of devising was committed to him as a branch of the legislative power, as a species of magistracy to be used for the encouragement and reward of virtue, and to repress and punish vice in the bosom of his family. The Romans considered the power of testing in this point of view: a testament was a law: *Pater familias uti legasset id jus esto, dicat testator et erit lex*. It was there, as with us, that the general law transmitting estates from the deceased to others, took effect only when there was no provision made by this particular law, called a will or testament.

On the other hand the power of devising his property was given to the owner as an arm to compel obedience when all other means should fail. An old man who should have no power to give to others, or to deprive them of a benefit, might be exposed and be bereft of help when he most needed it, if he could not reward faithful services, acknowledge the zeal and devotedness of friendship, and punish the neglect of ungrateful relations.

Besides, after the happiness of religion, the sweetest consolations of a dying man consist in making a last distribution of his patrimony as wisdom and justice may require.

2105. The right of devising property was practiced in England at a very

² Heineccius, De Jure Nat. lib. 1, § 287, *et seq.*

early period of her history, and fully established by statutes of 32 Henry VIII and 29 Charles II. The law of devise was imported into this country by the first settlers, and incorporated into our colonial jurisprudence with various modifications, generally an improvement on the original. The power of devising lands prevails in every state of the Union, subject of course to the special provisions of the laws of each where the lands are located.

2106. While the right to dispose of property by will is, as we have seen, the result of statutory enactments, yet with the exception of certain limited classes everybody can make a valid disposition of his property by will. Those who are incapable are either disabled because they are presumed not to know what they are doing, or because having understanding they are under the control of others. We will consider these two kinds of disability, and then examine as to the time when the disability attaches, and afterward as to the number of testators in a valid will.

2107. There are three causes which may prevent a testator, in the eye of the law, from knowing what he is doing. These are, want of mind, bodily defects, and inability on account of age.

2108. To make a will, a man must be of *sound mind and memory*, and this rule is but the echo of the Roman law, or rather of common sense; for a testament must be the last will of him who makes it, and if he is not of sound mind, he can have no will.

But a question arises: What is soundness or unsoundness of mind? By sound mind is meant that state of a man's mind which enables him to reason and come to a judgment upon ordinary subjects like other rational men. The words, unsound mind and unsound memory, have been used in several statutes, and sometimes indiscriminately, to signify not only lunacy, which is strictly periodical madness, but also a permanent insanity as distinguished from idiocy.³

A less degree of mental capacity is generally held sufficient for the execution of a will than that required for making a contract,⁴ but this is not the universal rule, since in some states it is held that the same capacity is required.

The question of testamentary disability on account of unsoundness of mind or mental incapacity is to be determined like other questions of fact. This is so far the case even that a person whom the law has deprived of the administration of his own affairs may make a will, and the utmost effect which will be given to adjudication of his unfitness to manage his property, upon the question of testamentary capacity, will be to raise a *prima facie* case of disability, which must be disproved by the party claiming under the will.⁵ A very important question arises as to the party on whom the burden of proof rests in cases where unsoundness of mind is set up in opposition to a will.

It is held upon one hand that the burden of proving soundness of mind rests on the party proving the will.⁶ On the other, it is claimed that the burden of proving unsoundness rests upon the contestants, that while the general burden rests upon the executor, the burden of showing incapacity rests upon the party alleging the fact; as, in the case of deeds and contracts.⁷ The practice

³ Lord Ely's Case, 1 Ridgw. App. Ir. 518; Ex parte Barnsley, 3 Atk. Ch. 171; Shelford, Lun. 5; Ray. Med. Jur. Prel. § 8; Haslam, Med. Jur. 336; Beck, Med. Jur. 573.

⁴ Horne v. Horne, 9 Ired. No. C. 99; Converse v. Converse, 21 Vt. 168; Potts v. House, 6 Ga. 324; Dunham's Appeal, 27 Conn. 192; Kirkwood v. Gordon, 7 Rich. So. C. 474; McClintock v. Curd, 32 Mo. 41; Daniel v. Daniel, 39 Penn. St. 192; Stubbs v. Houston, 33 Ala. N. S. 555.

⁵ Bannatyne v. Bannatyne, 14 Eng. L. & Eq. 581; Whitmack v. Stryker, 1 Green, Ch. N. J. 8.

⁶ Brooks v. Barrett, 7 Pick. Mass. 94; Gerrish v. Nason, 22 Me. 438.

⁷ Stevens v. Vancleve, 4 Wash. C. C. 262; Sloan v. Maxwell, 2 Green, Ch. N. J. 580; Chandler v. Ferris, 1 Harr. Del. 454; Pettes v. Bingham, 10 N. H. 515; Delafield v. Parish, 25 N. Y. 9; in re Coffman, 12 Iowa, 491.

is believed to be general to inquire of the attesting witnesses as to the sanity of the testator.

The matter is summed up by Judge Redfield as follows: The fact of capacity is so far involved in the proof of the execution of a will that it is competent for the party objecting to the validity of the instrument to cross-examine the witnesses of the other party, upon that point; and he is not obliged to wait till he puts in his own case and then recall the witnesses to the will, thus making them his own, as to the point of capacity of the testator, which he must do if that question is not involved in the proof of the will. But it does not seem equally clear that the party setting up the will is, upon principle, any more bound to examine the witnesses to this point, in the first instance, than he is to any other statutory requirement, such as age, discoveriture, citizenship, etc.⁸

2109. The acts and circumstances which indicate an *unsound mind* are extremely numerous, they manifest themselves in a thousand ways; sometimes they affect only some particular subject, as in monomania; at other times they extend generally over all a man's actions; they are continued without interval, or there are times when the unfortunate party who is the subject of them appears temporarily cured; they apply to all persons or only to some particular individuals. The insane man is sometimes furious, at other times gentle and imbecile; the incapacity arises from a congenital defect, from an obstacle to the development of the faculties, or from an accidental injury.

It would be impossible to consider all the classes of unsoundness of mind which have given rise to questions as to the existence of testamentary capacity.

Two matters only can be considered in view of the necessary limits assigned to the subject. These are delusions and lucid intervals as affecting testamentary capacity.

2110. By *delusion* is meant the state of mind of an individual who conceives something extravagant to exist which has no existence, and who is incapable of being reasoned out of that absurd conception; for example, should a parent unjustly persist, without the least ground, in attributing to his daughter a continued course of propensities and vices, there not being the slightest pretence or color of reason for the supposition, a just inference of insanity or delusion is presented to the minds of a jury, because a supposition long entertained and persisted in, after argument to the contrary, and against the natural affections of a parent, suggests that he must labor under a morbid mental delusion.⁹

2111. A *lucid interval* is that space of time between two fits of insanity during which a person *non compos* is completely restored to the perfect enjoyment of reason on every subject upon which the mind was previously cognizant.¹⁰ To understand whether a partial restoration to sanity is a lucid interval we must ascertain the nature of the interval and its duration.

2112. The celebrated D'Aguesseau has given a beautiful description of the nature of a lucid interval. He says: "It must not be a superficial tranquillity, nor a shadow of repose—*inumbraatæ quies*—but on the contrary a profound tranquillity, a real repose; it must not be a mere ray of reason, which only makes its absence more apparent when it is gone; not a flash of lightning,

⁸ Redfield, Wills, 41.

⁹ 3 Add. Eccl. 91; Hagg. Eccl. 27. See Connolly, Inq. in Insan. 384; Ray, Med. Jur. Prel. Views, § 20; 1 Powell, Dev. by Jarman, 130, note; Shelford, Lun. 296; Annales d'Hygiène Publique, tom. iii. p. 370; Redfield, Wills, 85; Lucas v. Parsons, 24 Ga. 640; Jenckes v. Smithfield, 2 R. I. 255; Townshend v. Townshend, 7 Gill, Md. 10; Florey v. Florey, 24 Ala. n. s. 241; Stanton v. Weatherax, 16 Barb. N. Y. 259; James v. Langdon, 7 B. Monr. Ky. 193; Gass v. Gass, 3 Humphr. Tenn. 278.

¹⁰ Shelford, Lun. 20; Male, Elem. of Forens. Med. 227; Haslam, Madness, 46; Reid, Essay on Ment. Hypo. 317; Willis, Ment. Derangem. 151.

which pierces through the darkness only to render it more gloomy and dismal ; not a glimmering, which unites night to the day ; but a perfect light, a lively and continued lustre, a full and entire day, interposed between two separate nights, of the fury which precedes and follows it ; and, to use another image, it is not a deceitful and faithless stillness, which follows and forebodes a storm, but a sure and steady tranquillity for a time, a real calm, a perfect serenity. Without looking for so many metaphors to represent the idea, it must not be a mere diminution, a remission of the complaint, but a kind of temporary cure, an intermission so clearly marked as in every respect to resemble the restoration to health."¹¹

2113. With regard to its *duration* the same learned chancellor says: "As it is impossible to judge in a moment of the quality of an interval, it must be sufficiently long to give an entire certainty of the temporary re-establishment of reason ; this cannot in general be defined, and it depends upon the different kinds of fury, but it is certain there must be some time, and a considerable time. There is much difference between an action and an interval. An action may be wise in appearance, although the author of it may be very unwise in fact ; but an interval cannot be perfect without being evidence of the soundness of the person who was before *non compos*. An action is but the rapid and momentary effect of the soul ; an interval is lasting and continued. An action marks but a single act ; an interval is composed of a series of actions."

2114. It is a rule that he who contends for a lucid interval must prove it, for a person once insane is presumed to be so till it be shown that he has a lucid interval or has recovered ;¹² unless, indeed, the alleged insanity was a long time before, and of a short continuance. And the wisdom of a will, where it is proved that the party framed it without assistance, is a strong presumption of the sanity of a testator.¹³

Considerable ingenuity has been exercised in attempting to state the distinction between a lucid interval and a remission, in which it is said there is a mere abatement of the symptoms. If, however, during a period of time the mind has recovered its general habit, and especially if this time be a period of considerable duration, even though not restored to its entire strength, a will made during such a period will be valid.¹⁴

2115. There seems to be little doubt that a person deaf, dumb, and blind may make a valid will, though it was formerly held otherwise, and this even where the defects are congenital. The essential point is to take care not only that no imposition is practiced, but that the parties assisting in the transaction should be abundantly able to show that no misunderstanding existed on the part of the testator.¹⁵

2116. By the Roman law, which the English law has followed in this respect, a will of chattels may be made by an infant, if a male, at the age of fourteen ; if a female, at twelve. But to make a devise of land the testator must be of full age. In the United States the rule is not uniform as to the capacity of an infant to make a will of personal estate. In some states an infant cannot make a will of personal chattels ; in others he may at an age designated in the statute.

2117. Some persons have sufficient mind to make a testamentary act, but they are deprived of this power in consequence of being incapable at the time to exert

¹¹ Second Plaidoyer, sur l'affaire du Prince de Conti, Œuvres, tom. iii. pp. 503, 504.

¹² 1 Greenleaf, Ev. § 1 ; Swinburne, Wills, 77 ; Coke, Litt. Butler's note, 185.

¹³ Clarke v. Cartright, 1 Phill. Eccl. 90 ; Temple v. Temple, 1 Hen. & M. Va. 476.

¹⁴ Ex parte Holyland, 11 Ves. Ch. 11 ; Hale v. Warren, 9 id. 611 ; Wright v. Lewis, 5 Rich. So. C. 212 ; Gangevere's Estate, 14 Penn. St. 417 ; Gombault v. Administrator, 4 Bradf. Surr. N. Y. 226.

¹⁵ See before, 372, note.

a free will, either in point of fact or in consequence of a presumption of law. Among these are married women, known technically as *femes covert*, and persons under duress.

2118. The state of a married woman is called *coverture*; while a woman is in this condition she has no power whatever at common law to make a will, strictly speaking.¹⁶ She may, however, dispose of her lands when they have been conveyed to a trustee by a deed of settlement before marriage, when she is clothed with such an authority. This is not properly a will, but an appointment in the nature of a will. She may in the same manner devise by way of execution of a power, but this must be done with the same solemnities as if she executed the deed while sole.¹⁷

By statute in many of the states the power of married women to make wills has been considerably enlarged, and it may be stated that in most of the states a married woman may convey her separate estate by will in the same manner as a feme sole, subject in most of these states to the restriction that she shall not repair her husband's right as to curtesy, etc., unless he assent.¹⁸

2119. By *duress* is meant an actual or threatened violence, or restraint of a man's person contrary to law, to compel him to do something against his will.¹⁹ As a will or testament is to be made freely, it is evident that an instrument executed by a person while in duress is invalid and of no force whatever in law.

But although the testator may not be completely in the power of another, yet if he is under such influence as to destroy the freedom of his will, the testamentary act will be void.²⁰ But that kind of influence which arises from acts of kindness, attention, and good conduct will not vitiate a testament.²¹

¹⁶ *Osgood v. Breed*, 12 Mass. 225; *Marston v. Norton*, 5 N. H. 205; *West v. West*, 10 Serg. & R. Penn. 445.

¹⁷ *Casson v. Dode*, 1 Brown, Ch. 99.

¹⁸ 2 Washburn, Real Prop. 685. The law is given by Professor Washburn for several of the states as follows, viz.: A married woman in *Alabama* has a general power of devising by will, Ala. Code, 1852, § 1969; *Arkansas*, is limited to power secured by marriage settlements or authority in writing from husband before marriage, Ark. Dig. Stat. p. 1073, § 3; *California*, with husband's consent, has general power of devising, Cal. Stat. 1850, p. 140, § 2; *Connecticut*, has general power, Conn. Comp. Stat. 1854, p. 484, § 1; *Illinois*, has full power, Ill. Stat. 1855, Ch. 110, § 1; *Indiana*, may be clothed with power to devise without concurrence of husband, Ind. Rev. Stat. 1852, Ch. 113, § 15; *Kansas*, may bequeath all her property with husband's assent, not exceeding one half without, Kans. Stat. 1860, Ch. 141, § 4; *Kentucky*, full power of her separate property, Ky. Rev. Stat. 694; *Maine*, may devise as if sole, Me. Rev. Stat. 1857, Ch. 61, § 1; *Maryland*, may devise with husband's assent subscribed to will, Md. Code, 1860, p. 686; *Massachusetts*, may devise real estate like *feme sole*, but not to impair husband's rights without his assent, Mass. Gen. Stat. Ch. 108, § 9; *Michigan*, may devise with husband's assent, Mich. Rev. Stat. 1846, Ch. 68, § 1; *Missouri*, is limited to power secured by marriage settlements or authority in writing from husband before marriage, Mo. Rev. Stat. 1855, p. 1567, § 3; *New Hampshire*, may devise, saving husband's rights by marriage contract, N. H. Comp. Stat. 1853, Ch. 158, § 11; *Ohio*, may devise her separate lands, Allen v. Little, 5 Ohio, 65; *Pennsylvania*, may devise, subject to husband's curtesy, etc., Dunlop, Laws Pa. 996; *Rhode Island*, has full power, R. I. Rev. Stat. 1857, Ch. 136, § 12; *Tennessee*, may devise separate estate, Tenn. Stat. 1852, Ch. 180, § 4; *Vermont*, may devise separate real estate, Vt. Gen. Stat. 1863, Ch. 71, § 17.

¹⁹ See before, 502, beyond, 2164.

²⁰ *Mountain v. Bennett*, 1 Cox, Ch. 355; *Noble v. Enos*, 19 Ind. 72; *Sutton v. Sutton*, 5 Harr. Del. 459; *McDaniel v. Crosby*, 19 Ark. 533.

²¹ *Weir v. Fitzgerald*, 2 Bradf. Surr. N. Y. 42; *Lucas v. Parsons*, 27 Ga. 593; *Miller v. Miller*, 3 Serg. & R. Penn. 269; 1 Hagg. Eccl. 581; 2 *id.* 142; 13 Serg. & R. Penn. 323; 4 Me. 220; 1 Paige, Ch. N. Y. 171. This reasonable rule agrees with the civil law. Furgole, des Testaments, c. 5, sec. 3, n. 25. These excessive complaisances, so low, servile, and contemptible when they are the offspring of interested motives, are ennobled and become virtues when they arise from conjugal love, filial piety, and devotedness to holy friendship. The law cannot therefore repudiate actions of which it cannot judge of the motive. 5 Toullier, n. 708. See as to the degree of influence which will vitiate a last will, *Duffield v. Morris*, 2 Harr. Del. 375; *Chandler v. Ferris*, 1 Harr. Del. 454; *O'Neill v. Farr*,

But a suggestion made to a testator for the purpose of procuring a devise in a particular way, when false, will amount in general to a fraud.²² When the suggestion is true, there is nothing in it worthy of reprobation; it is only reminding the testator of something, or of some person whom he might have forgotten.

In general, a will cannot be set aside on the ground that it has been obtained when the testator was under the power of another, if there has been neither violence, fraud, nor surprise.

2120. Sometimes a will is made by a person having legal capacity, who afterward becomes incapable, and who again becomes legally qualified to make a will; sometimes the will is made by a person incapable at the time, but who afterward becomes capable; at other times the testator is incapable, then he regains his health and capacity, and afterward, at the time of his death, he labors under a legal disability.

2121. When a devise is made by a person having capacity to make it, and the testator or testatrix afterward becomes incapacitated, the devise will, in some cases, be good, and in others it will be void. These cases will be separately considered.

Such a devise is good when the incapacity arises from natural causes; as, when the testator becomes insane. The insanity, which is a cause of incapacity, has no effect on the validity of the will.²³

When the incapacity arises from the act of the party, the law is otherwise; as, where a woman, while sole, makes a will, and afterward she marries, the marriage will operate as a revocation, and the death of her husband will not restore the validity of the will. Nothing but a republication or re-execution will have that effect.²⁴

2122. When a will is made while the testator labored under the incapacity of infancy, lunacy, duress, coverture, and the like, it has no force whatever, and will be set aside. Having no disposing virtue, it will not become valid by the removal of the incapacity of the testator, although he may die competent to make a will, because having no legal authority at the time of making it, it has not acquired any afterward.²⁵ But the testator may give it life by making a republication of it after the disability has been removed, or by re-execution, which is the better method.

The Roman law in this respect is in unison with the common law. When the testator is incapable at the time of making the will, although he may become capable afterward, such will is void, let the incapacity be what it may.²⁶

2123. Usually a will is made by a single person, and this appears to be the legal way of making a will. In a case, three persons, George, Martha, and Susannah, made a joint will of their separate property, which was to take effect after their death. After the death of George, one of the three, Martha, one of

1 Rich. So. C. 80; *Farr v. Thompson*, Cheves, So. C. 37; *Martin v. The Executors*, 2 Speers, So. C. 260; *Harrison v. Will*, 1 B. Monr. Ky. 351; *Brown v. Moore*, 6 Yerg. Tenn. 272; *Browne v. Molliston*, 3 Whart. Penn. 129; *Blanchard v. Nestle*, 3 Den. N. Y. 37; beyond, **2165**. It has been said that the influence of one occupying an unlawful relationship is naturally and ordinarily unlawful in so far as it respects testamentary dispositions favorable to the one holding the unlawful relation and unfavorable to the heirs. *Dean v. Negley*, 41 Penn. St. 312.

²² Bacon, Abr. *Wills*, G. 3.

²³ Swinburne, *Wills*, part 11, s. 3, pl. 3; 4 Coke, 61, b; 1 Williams, *Wills*, 17.

²⁴ *Miller v. Brown*, 2 Hagg. Eccl. 209; *Braham v. Burchell*, 3 Add. Eccl. 264. See *Os-good v. Breed*, 12 Mass. 525.

²⁵ Cruise, Dig. tit. 38, c. 2, s. 13; Dy. 143, b; And. 182; 1 Powell, Dev. by Jarman, 140.

²⁶ Inst. 2, 12, 1; Furgole, des Testaments, Ch. 4, n. 9; Domat, 2^eme partie, liv. 3, t. 1, s. 2, n. 2.

the two survivors, made a will giving the same estate which had been bequeathed by the joint will, and then died. On a question whether the will of Martha or the joint will should take the property, it was held the joint instrument was not a will. Sir John Nichols says, "I have no hesitation whatever in rejecting the allegation, proposing the mutual or conjoint will, as that of the party deceased in this cause, on the principle that an instrument of this nature is unknown to the testamentary law of this country; or, in other words, that it is unknown, as a will, to the law of this country at all. It may, for aught I know, be valid as a compact, it may be operative in equity to the extent of making devisees of the will trustees for performing the deceased's part of the compact."²⁷

It appears to be well settled, however, that joint wills may be made which will be valid.²⁸

2124. In general, all persons in being at the time of making the will may be *devisees* if they are capable of acquiring lands. A person insane, a feme covert, an alien, where he is competent to hold lands, and an infant, may be devisees.

The devise may also be to a child unborn. It never was questioned that a devise to an infant *in ventre sa mère* was valid when the testator appeared to be aware that the devisee could not take immediately; as, in a devise to an infant *in ventre sa mère* when he shall be born;²⁹ or where a testator devises that if the child with whom his wife is now *enceinte* shall be born, it shall have a share with the rest of the children.³⁰

A natural child *in ventre sa mère* may take under certain circumstances, which will be considered under the next head.

The law has wisely restricted the right of corporations as to their being devisees. Though the English statute of charitable uses has not been re-enacted in most of the states, yet it seems that a devise of a charity, not directly to a corporation, but in trust for a corporation, would be good.³¹

2125. The devisee must be *ascertained*, or the devise will be void. A devise is generally given to a devisee by name, and, in such case, if the name be mistaken, it may be shown, either by other parts of the will or by evidence *aliunde*,³² who was intended.

Devisees are sometimes given to a class of individuals, as "child," "children," "grandchildren," "son," "family," "nearest relations," and the like. In cases of this kind, parol evidence is admissible of any extrinsic circumstances tending to show what person or persons were intended by the testator, or to ascertain his meaning in other respects.³³

A devise to a bastard child *in ventre sa mère* is not good when the gift is made to it as the child of a certain person as its father, because, in point of law, it is uncertain who is the father. After such child is born, and has obtained a reputation of being the child of such father, a devise to it as such would be

²⁷ *Hobson v. Blackburn*, 1 Add. Eccl. 274. See *Clayton v. Leverman*, 2 Dev. & B. No. C. 558. The Civil Code of Louisiana, art. 1565, declares that a testament cannot be made by the same act, by two or more persons, either for the benefit of a third person, or under the title of a reciprocal or mutual disposition.

²⁸ *Redfield, Wills*, 182; *Re Stracey*, 1 Deane & S. Eccl. 6; *Re Raine*, 1 Swab. & T. Eccl. 144; *Day Ex parte*, 1 Bradf. Surr. N. Y. 476.

²⁹ 1 Lev. 135.

³⁰ 2 Kebl. 300.

³¹ 4 Kent, Comm. 507, 4th ed.

³² *Beaumont v. Fell*, 2 P. Will. Ch. 140; *Wigram, Wills*, pl. 184, 188; 1 *Greenleaf, Ev.* §§ 290, 203; see 3 *Barnew. & Ald.* 632 to 642; 6 Term, 676; 1 *Atk. Ch.* 410; 5 *Coke*, 68, b; 6 *Ves. Ch.* 42.

³³ 1 *Greenleaf, Ev.* § 288; see 2 *Story, Eq. Jur.* § 1071; *Jeremy, Eq. Jur.* 100; 1 *Powell, Dev. by Jarman*, 274, note (7).

valid.³⁴ But a devise to an infant of whom A is *enceinte*, without any reference to the father, is good, as there can be no mistake as to the child, nor any uncertainty.³⁵

2126. *Property* in a thing is the right to dispose of it in the most unlimited manner. The owner of property would then seem to have the most absolute power to dispose of it by his last will. But it is to be remembered that before the proprietor can so exercise his right he must do justice to others. Before he can be liberal he must be just; if, therefore, he be indebted, his estate must be applied to the satisfaction of his just debts before he can devise it as a liberality to another.

With this limitation, the English law, which has been adopted in most of the states of the Union, permits a testator to devise his property. The Roman, or civil law, trusting less to the dictates of nature than the English law, wisely restrained the parent from disinheriting his children, unless in special cases, and, by virtue of the Falcidian law, set apart a fourth of the estate for the heirs, which could not be disposed of by will.³⁶ This is the law of the state of Louisiana,³⁷ somewhat modified.

The practice of restricting a testator's right to devise seems to have been the common law of England in ancient times, and, doubtless, the rule was adopted from the Falcidian law. But by slow and imperceptible innovations the English law was altered, and the testator obtained the right to bequeath all his personal estate without any restriction.³⁸

2127. In this country the right to dispose of real estate is generally unlimited, with this exception, that the wife of the testator has her election to take under the will, or to claim her thirds or dower out of the estate. The testator may in general bequeath all his personal estate without any restrictions. But in some states, by statute, the husband's right to dispose of his personal chattels is limited. This is the case in Pennsylvania. In Louisiana the wife has a community of interest, and her rights cannot be disposed of by the husband.

2128. As to the nature of the estate which is the subject of a devise, it may be observed that every species of estate, real or personal, corporeal or incorporeal, may be devised.³⁹

2129. By the English law the testator must be seised of the lands devised at the time of making the will. Hence it follows that an estate which the testator did not own, at the time of making his will, cannot pass, whatever words may be used. And, for the same reason, a right of entry in land was held not to be devisable, the devisor having no seisin.⁴⁰

But this rule, that the testator must be seised at the time of making the will, although it may exist in some of the states of the Union, is not universal, and after-purchased lands as well as a right of entry may be devised in Connecticut, Massachusetts, New York, Pennsylvania, Virginia, and perhaps other states.

2130. It is a rule, where the will gives to the heir at law exactly the

³⁴ *Metham v. Devonshire*, 1 P. Will. Ch. 529; Coke, Litt. 3, b.

³⁵ See *Gordon v. Gordon*, 1 Mer. Ch. 141; *Evans v. Massey*, 8 Price, Exch. 22; *Dawson v. Dawson*, Madd. & G. Ch. 262; 17 Ves. Ch. 532.

³⁶ Inst. 2, 22; Dig. 35, 2; Code, 6, 50; Nov. 1 et 131.

³⁷ The Civil Code of Louisiana provides, "art. 1480, Donations *inter vivos*, or *mortis causa*, cannot exceed two-thirds of the property of the disposer, if he leaves at his decease a legitimate child; one-half, if he leaves two children; one-third, if he leaves three or a greater number." See also arts. 1608, 1609.

³⁸ 2 Sharswood, Blackst. Comm. 492-494.

³⁹ *Jones v. Roe*, 3 Term, 88; 1 H. Blackst. 30.

⁴⁰ See *Carter v. Thomas*, 4 Me. 341; *Whitemore v. Bean*, 6 N. H. 47.

same estate which he would inherit, that the devise is void, and the heir takes the property by descent.

A devise in other cases vests in the devisee all the rights which the devisor had in the estate, subject, as has been observed, to the rights of creditors, and of his wife. But this must be understood, provided that such appears to have been the intention of the devisor, for he may devise a less estate than he held, and then the devisee will take only so much as is devised to him.

2131. The laws of each state have regulated the *form* of wills, and these must be observed, or the devise will be considered a nullity. The general doctrine is, that a will of lands is governed by the laws of the place where the land is situated; but wills of chattels are regulated by the laws of the domicile of the testator, though the personal property may be in other countries, and the will may not be executed according to their laws. *Mobilia personam sequuntur, immobilia situm.*⁴¹ The law authorizes the testator to make his testament, but it is only on the condition that he complies with its regulations; if he does not fulfil the conditions, the dispositions he makes, not having been authorized by law, are of course null, and without any efficacy whatever. The law requires that the testator's will shall be manifested in a particular way, and, unless it so appears, it is not manifested at all.

A will may be written in any known language and by any one who is intrusted by the testator to write it. It is not required, as in countries on the continent of Europe, that the will should be written by, or acknowledged before, a public officer.⁴²

2132. The principal *requisites* of a will are, that it be written, that it be dated, that it be signed, that it be witnessed, and that it be published.

No will is good to pass land unless it is in writing, and the writing be on paper or parchment, in order to prevent frauds by alterations, which could be more easily perpetrated if written on other materials. It may be written in any known characters; if, however, it should be written in hieroglyphics, it would be liable to suspicion of fraud.

It matters not, as to the form, whether the instrument be in that usually adopted for a devise, or of a deed, provided it clearly appear that a will, and no more, was intended.⁴³ And the test seems to be this: whether the instrument is to take effect wholly after the death of the maker, or whether it is to go into operation, as to some parts at least, in his lifetime; in the former case, the instrument is considered a will; in the latter, a deed.⁴⁴ Whenever the legal estate in the thing upon which the instrument operates passes at the time of its execution it is a deed.⁴⁵

But at the time of making the writing the party must have a serious intention of making such will. If a man, therefore, jestingly or boastingly, and not seriously, writes or says that such person shall have his goods, or be his executor, this is no will.⁴⁶ And, for the same reason, a promise made in a

⁴¹ Fœlix, Dr. Intern. privé, 60-77; Desesbats v. Berquiers, 1 Binn. Penn. 337; see Dixon v. Ramsay, 3 Cranch, 319; De Sobry v. De Laistre, 2 Harr. & J. Md. 224; Haway v. Richards, 1 Mas. C. C. 381; Holmes v. Remsen, 4 Johns. Ch. N. Y. 460; Harvey v. Richards, 1 Mas. C. C. 381; Kerr v. Moon, 9 Wheat. 566.

⁴² In Louisiana, wills are generally made before notaries.

⁴³ 1 Jarman, Wills, 11, 15.

⁴⁴ Allison v. Allison, 4 Hawks, No. C. 141, 171; Cumming v. Cumming, 3 Ga. 460, 484; Jackson v. Culpepper, 3 Ga. 569, 573, 574; Hester v. Young, 2 Ga. 31, 46; Atty. Gen. v. Jones, 3 Price, Exch. 368; Thompson v. Brown, 3 Mylne & K. Ch. 32.

⁴⁵ Allison v. Allison, 4 Hawks, No. C. 171; Cumming v. Cumming, 3 Ga. 484. See Hamilton v. Pease, 2 Des. Eq. So. C. 92.

⁴⁶ Bacon, Abr. Wills, C.; Comyn, Dig. Estates by Devise, D, 1. See 4 Serg. & R. Penn. 545; 3 Yeates, Penn. 324; 5 Binn. Penn. 490.

letter, when the writer did not intend to devise, will not be effectual as a will; as, where a man living in Philadelphia wrote a letter to his sister in Germany, desiring her to send her son to him, and added, "and if he proved obedient and followed all his direction, he should be the heir of his whole estate."⁴⁷

2133. The will ought to be *dated*; this is one of the principal circumstances which establish the validity of a will, or which enable the courts to detect a fraud in its execution. The fact that the testator was in a particular place at the date of the will, and that the witnesses were not there; that the will is in the hand writing of a person who was dead at the time it bears date; that it was witnessed by a person who was dead before its date, or by a person who was unknown to the alleged testator at that time; and a thousand circumstances which may be easily imagined will be evidence to prove the will to be genuine or otherwise. Again, where there are two papers, both purporting to be wills, if without date, it may be difficult to prove which is the last.

But it not unfrequently happens that there are circumstances mentioned in the will which corroborate or disprove the date; for example, where a testator gives lands to an individual, and describes him as a member of congress, or governor of the state, and the individual at the date was such, this will be a circumstance to establish it; but should the devisee at the time never have been a member of congress or governor of the state, it would be a suspicious circumstance against it.

2134. An error in the date, however, would not vitiate the instrument where everything else was fair, particularly if in the will itself there should be material or physical elements which would correct, verify, and fix it necessarily. For example, if a will should be dated the fourth of July, "one thousand eight hundred," these words being printed and a blank left to write other words, and in that will there should be a bequest to James K. Polk, "now president of the United States," it is evident that the date might be corrected by the fact that James K. Polk was not president till the year 1844; or if the testator should state his age to be thirty years at the date of the will, and he was born in the year 1815, then the will must have been made in eighteen hundred and forty-five, and these latter words would be supplied to correct the error.

2135. It has been observed that a will concerning lands must be executed according to the laws of the place where the lands are situated.⁴⁸ By the English statute of frauds, which has been adopted in substance, with some modifications, in those states where their code is based on the common law, such will must be signed by the testator.

A *signature* is the act of putting down a man's name at the end of an instrument to attest its validity. The name thus written down is also called a signature. One would scarcely have supposed that, when a statute required that a will should have the signature of the testator, the courts should have decided, as they did, that when a testator commenced a will with these words, "I, A B, make this my will," it would have been considered a sufficient signing.⁴⁹ In this country the general rule is that a will must be signed at the end in order to give it validity; but the rule is not universal.⁵⁰

In Vermont, besides a signature, the will requires a seal.

2136. The English statute of frauds, already mentioned, not only requires that the will shall be signed by the testator, but that it shall be *attested* by witnesses. This provision prevails in many of the states, and three witnesses are

⁴⁷ *Stein v. North*, 3 Yeates, Penn. 324.

⁴⁸ *Kerr v. Moon*, 9 Wheat. 566.

⁴⁹ *Lemayne v. Stanley*, 3 Lev. 1. See *Sarah Miles' will*, 4 Dan. Ky. 1.

⁵⁰ *Sarah Miles' will*, 4 Dan. Ky. 1.

required to attest the will; this is the case in Alabama, Connecticut, Georgia, Maine, Maryland, Massachusetts, Mississippi, New Hampshire, New Jersey, Rhode Island, South Carolina, and Vermont; two witnesses only are required in Delaware, Illinois, Indiana, Kentucky, Missouri, North Carolina, New York, Ohio, Tennessee, and Virginia. In Pennsylvania, a will of lands in writing is good without any subscribing witnesses; but, in that case, the hand writing must be proved by two witnesses. The civil code of Louisiana requires at least three witnesses to a nuncupative testament under private signature,⁵¹ and four to a mystic testament;⁵² and these witnesses must not be such as are forbidden by the code, namely, women, of whatever age; male children who have not attained the age of sixteen years complete; persons insane, deaf, dumb, or blind; person whom the criminal law declares incapable of exercising civil functions, and slaves.⁵³

By the English statute of frauds the will is to be signed by the testator, and attested and subscribed by the witnesses in his presence. The construction put upon this statute by the English courts is that there may be a constructive presence. It has been decided that if the witnesses were in view, and where the testator had, or might have seen them, with some little effort, they were to be deemed in his presence.⁵⁴ It was also held that if the will was signed by the testator, in the absence of the witnesses, and produced by him, it was not necessary it should be actually signed in their presence.⁵⁵ The testator must have a capacity to know that the witnesses were present; if, therefore, he was in an insensible state, or asleep, he would not be considered as being present;⁵⁶ and with this very reasonable rule agrees the civil law. By that law he who is considered incapable of giving his consent to an act is not to be considered as present, although he is in the same place; a lunatic, or a man sleeping, would, therefore, not be considered present.⁵⁷

2137. In its most usual signification the word *publication* means the act by which a thing is made public; but when spoken of a will, it signifies that the testator has done some act from which it can be concluded that he intended the instrument to operate as a will.⁵⁸

This publication is either express or implied. It is express when the testator declares before witnesses that he publishes the paper as his will. It is implied from many acts of his which manifest an intention that the will shall have effect.⁵⁹ The words signed and published by A B "as for his last will" are a sufficient publication; and a delivery of a paper as a deed will also be sufficient.⁶⁰

2138. But the law on the subject of publication of wills is not uniform in all the states; in New Jersey the statute of wills requires that such an instrument shall be published in the presence of the witnesses, either wholly by the testator, or by the scrivener or other agents asking questions, or the testator ex-

⁵¹ La. Civ. Code, art. 1641.

⁵² La. Civ. Code, art. 1643.

⁵³ La. Civ. Code, art. 1534

⁵⁴ *Mason v. Harrison*, 5 Harr. & J. Md. 480.

⁵⁵ *Bond v. Seawell*, 3 Burr, 1773.

⁵⁶ *Right v. Price*, Dougl. 241.

⁵⁷ Dig. 41, 2, 1, 3.

⁵⁸ *Cruise*, Dig. t. 38, c. 5, s. 47; 4 Me. 220; Comyn, Dig. *Estates by Devise* (E. 2). It is not necessary to prove that the will was read to him, or that he had read it himself. Having executed it, he will be presumed to know its contents. *Shanks v. Christopher*, 3 A. K. Marsh. Ky. 145.

⁵⁹ *Wallis v. Wallis*, 4 Burns, Eccl. Law, 114.

⁶⁰ *Trimmer v. Jackson*, 4 Burns, Eccl. Law, 117. See *Ross v. Ewer*, 3 Atk. Ch. 161; *Peat v. Ongly*, 1 Com. 196; *Small v. Small*, 4 Me. 220; *Barnet's Appeal*, 3 Rawle, Penn. 15; *Ray v. Walton*, 2 A. K. Marsh. Ky. 71; *Bagwell v. Elliott*, 2 Rand. Va. 199; *Loy v. Kennedy*, 1 Watts & S. Penn. 396.

pressing his assent by words or signs which plainly indicate his understanding of, and acquiescence in, such publication.⁶¹

2139. Independently of wills being in writing and not in writing, they are subject to other divisions.

Such are nuncupative, mystic, and olographic wills.

2140. A *nuncupative will* is an oral declaration, solemnly made before a competent number of lawful witnesses by a testator, of what his will is respecting his estate.

A will of goods and chattels could be made at common law without writing. But being liable to great abuse and perjury, the statute of frauds, 29 Car. II, c. 3, was passed. It enacts "that no nuncupative will shall be good, when the estate bequeathed exceeds in value thirty pounds, unless proved by three witnesses present at the making thereof, and who shall be specially required to bear witness to it; nor unless it was made in the testator's last sickness, in his own dwelling-house, or where he had been previously resident ten days at the least, except becoming sick from home, and dying without returning, and reduced to writing within six days after the testator's death, and not proved till fourteen days after his death, and the widow or next of kin has been summoned to contest it."

These provisions of the statute have been generally re-enacted in this country, but as they were found inefficient to prevent frauds and perjuries, nuncupative wills have been abolished in several states.⁶²

2141. In Louisiana, the name of nuncupative or open testament is given to one made under private signature, written by the testator himself, or by any other person from his dictation; or even by one of the witnesses residing in the place where the will is received, or of seven witnesses out of that place.⁶³ But these formalities are varied under certain circumstances. These nuncupative wills are distinguished from two other kinds used in that state, namely, the mystic or sealed testaments, and olographic testaments.

It is proper to observe that in Louisiana these nuncupative testaments are of two kinds, one by public act, received by a notary public in the presence of three witnesses residing in the place where the will is executed, or of five not residing in that place; the other under private signature, as above mentioned.

2142. In Louisiana, there is a form of testament, derived from the civil law, called a *mystic* or *secret testament*, otherwise called the closed testament. It is a form of making a will, which principally consists in inclosing it in an envelope, and sealing it in the presence of witnesses.

The code prescribes that such testaments shall be made in the following manner: The testator must sign his dispositions, whether he has written them himself, or caused them to be written by another person. The paper containing those dispositions, or the paper serving as their envelope, must be closed and sealed. The testator shall present it, thus closed and sealed, to the notary and to seven witnesses, or he shall cause it to be closed and sealed in their presence. Then he shall declare to the notary, in the presence of the witnesses, that that paper contains his testament, written by himself, or by another by his direction, and signed by him, the testator. The notary shall then draw up the act of superscription, which shall be written on that paper, or on the sheet that serves as its envelope, and that act shall be signed by the testator, and by the notary and the witnesses.⁶⁴

All that is above prescribed shall be done without interruption or turning

⁶¹ Den v. Milton, 4 Halst. N. J. 70.

⁶² La. Civ. Code, art. 1569; 2 N. Y. Rev. St. 60.

⁶³ La. Civ. Code, art. 1574.

⁶⁴ La. Civ. Code, art. 1577.

aside to other acts; and in case the testator, by reason of any hindrance that has happened since the signing of the testament, cannot sign the act of superscription, mention shall be made of the declaration made by him thereof, without its being necessary in that case to increase the number of witnesses.⁶⁵

Those who do not know how, or are not able to write, and those who know not how or are not able to sign their names, cannot make dispositions in the form of the mystic will.⁶⁶

If any one of the witnesses to the act of superscription knows not how to sign, express mention shall be made thereof. In all cases the act must be signed by at least two witnesses.⁶⁷

2143. The term *olographic testament* is derived from the civil law. An olographic testament is one wholly written by the testator himself. This kind of testament is common in Louisiana. In order to be valid it must be entirely written, dated, and signed by the hand of the testator. It is subject to no other form, and it may be made anywhere, even out of the state.⁶⁸

Such a will is perfectly good in Pennsylvania to pass real or personal estate, when the hand writing of the testator is proved by two witnesses.⁶⁹

2144. A *codicil* is an addition or supplement to a will; it must be executed with the same solemnities. A codicil is a part of the will, the two instruments making but one testament.⁷⁰

This instrument, like most of the law relating to the manner of making and executing wills, is derived from the Roman law. This law required that a regular will should be attested by seven Roman citizens, *omni exceptione majores*. A legacy could be bequeathed, but the heir could not be appointed by codicil, though he might be made heir indirectly by way of *fidei commissum*, or trust.

Codicils were chiefly intended to mitigate the strictness of the ancient Roman law. They owe their origin to the following circumstances: Lucius Lentulus, dying in Africa, left codicils, confirmed by anticipation by will of former date, and in those codicils requested the emperor Augustus, by way of *fidei commissum*, or trust, to do something therein expressed. The emperor carried this will into effect, and the daughter of Lentulus paid legacies which she would not otherwise have been legally bound to pay. Other persons made similar *fidei commissa*, and then the emperor, by advice of learned men whom he consulted, sanctioned the making of codicils, and thus they became clothed with legal authority.⁷¹

2145. Following the civil law, formerly the difference between a will and a codicil consisted in this, that in the former an executor was named, while in the latter none was appointed; but that difference does not now exist; a will does not lose any of its efficacy because no executor is appointed. An estate devised by such will would equally pass to the devisee, as if an executor had been named, and the title to the personal estate would be vested in the administrator, with the will annexed, who would be bound to pay legacies as if he had been appointed executor.

There may be several codicils to one will, and the original instrument and all the codicils may make but one will. The will is the disposition and desire of the testator; the testament and the codicils are only the instruments which contain such will.⁷²

⁶⁵ La. Civ. Code, art. 1578.

⁶⁶ La. Civ. Code, art. 1579.

⁶⁷ La. Civ. Code, art. 1580.

⁶⁸ La. Civ. Code, art. 1581.

⁶⁹ *Arndt v. Arndt*, 1 Serg. & R. Penn. 256; *Barnet's Appeal*, 3 Rawle, Penn. 21.

⁷⁰ *Sherer v. Bishop*, 4 Brown, Ch. 55; *Fuller v. Hooper*, 2 Ves. Ch. 242; 4 Ves. Ch. 610; 2 Ridgw. App. Ir. 43.

⁷¹ Inst. 2, 25; Bowyer, Com. 155, 156.

⁷² 2 Ves. Sen. Ch. 242; *Beall v. Cunningham*, 3 B. Monr. Ky. 390; *Pollock v. Glassell*, 2 Gratt. Va. 439; *Chambers v. McDaniel*, 6 Ired. No. C. 226.

The principal difference now existing between a testament and a codicil is that the former is made first, that the latter is intended to modify or change some provisions in the testament. The codicil does not necessarily revoke the testament otherwise than as its particular dispositions show.⁷³

2146. The testator has at all times, during his life, the power of changing his mind as to his property, and he may dispose of it at any time as he pleases,⁷⁴ it being a maxim that the first deed and the last will have alone any efficacy. The testator may, therefore, make a second will, and by that revoke the first, and again revoke the latter, and so on at his pleasure. And he can never deprive himself of the right of devising, or restrain himself from using the full liberty of making his will—*Nemo potest sibi testamento eam legem dicere non liceat.*⁷⁵

2147. When the testator has not made use of the faculty which he had of revoking his will, he is considered as having continued in the same mind until the time of his death. But an exception has been made to this general rule, that when a will is made for a temporary purpose it is conditional, and may be presumed to be revoked when that purpose is answered.

An individual in search of health, when about leaving home, made a testament which began as follows: "My wish, desire, and intention now is, that if I should not return (which I will, no preventing Providence), what I own shall be divided as follows," etc. And then he disposes of his property with reference to his family as it then existed, and to a probable alteration in it, arising from the supposed pregnancy of his wife; he died about a month after he returned home; it was held that the disposal was subject to the condition of his dying away from home, and therefore that the paper ought not to be admitted to probate.⁷⁶

2148. A *revocation* is the act by which a person having authority calls back or annuls a power, gift, or benefit which had been bestowed upon another.

Wills may become null by the act of the testator himself, by the act of law, by facts which have happened since they were made which prevent their execution, and for want of the formalities required by law, or for other causes. This subject will therefore naturally divide itself into these four heads.

2149. The revocation of wills may take place by the *act of the testator*, which is either express or implied, general or special.

It is express when the testator has formally declared in writing that he revokes his will, or that he revokes certain legacies or certain particular dispositions.

Implied when it arises from some other disposition of the testator, or from a fact which supposes a change of his will.

It is general when the whole will is revoked.

Special when it affects only some of its dispositions, leaving the others untouched.

2150. The first question to be considered is, In what form is the revocation to be made? If we follow simply our reason, we should imagine that, the testament deriving all its force from the will of the testator, the revocation ought to take place whenever a change of his will was made manifest, not by equivocal acts, but by those which are received as evidence of facts in courts of justice. But to prevent the admission of loose testimony which might not unfrequently

⁷³ Brant v. Wilson, 8 Cow. N. Y. 56.

⁷⁴ Forse and Hembling's Case, 4 Coke, 61, b.

⁷⁵ Dig. 17, 2, 52, 9; Vinyor's case, 8 Coke, 81, b.

⁷⁶ Todd's Will, 2 Watts & S. Penn. 145. See Tarver v. Tarver, 9 Pet. 174.

lead to perjury, the English statute of frauds, in imitation of the Roman law,⁷⁷ required that the same formalities should be used in revoking a will by a subsequent one as were required to establish it. This is the general rule in the United States.⁷⁸

2151. By an *implied revocation* is meant that which results from the acts or dispositions of the testator which indicate or suppose on his part a change of his will. Let us first examine the implied revocation which arises from posterior testamentary dispositions; secondly, the revocation which is effected by the sale or other appropriation of the property given; thirdly, by the loss of the thing given; fourthly, by the destruction of the will.

2152. We have seen that a testator may make several wills and codicils, and that, when they are not inconsistent with each other, they are all as but one will. But when there is an incompatibility between them, the last shall prevail; but still, when they are not incompatible, they shall all stand.

For example, if, after having devised my house in Philadelphia to Titius, by another will I make a variety of dispositions without revoking the former will, and say nothing of my house nor about Titius, the first will shall stand as it regards the devise to Titius; but if, on the contrary, by a codicil I give the same house to Mevius, the devise to Titius is revoked, although there is no express revocation. But in this latter case it must be clear that the two devises cannot stand, and that one or the other must be void, and also that the testator did not intend both devises to take as tenants in common.⁷⁹

2153. Every *alienation*, however made, of the property devised, revokes the will *pro tanto*; but if any part of the thing devised remains, the devise shall be good for that. For example, if a testator devise his farm containing one hundred acres of land to his son John, and afterward he sell ten acres of it, the devise to John shall be good for what he owned at the time of his death; if, on the contrary, he had sold the whole, the devise to John would have failed.⁸⁰

2154. In Pennsylvania and New York it has been holden that a sale of a lot in fee, reserving a ground rent of it, so changed the property that the devisee was not entitled to any thing.⁸¹ Indeed, the same principle seems to have been established in various cases. It has been holden that where a testator parted with the estate by making a conveyance of it, and then took it back by the same instrument or by a declaration of uses, it operated as a revocation, because he once parted with the estate; for either an intention to revoke or an alteration of the estate without such intention will operate a revocation.⁸²

2155. For the same reason, when the testator dies indebted so that all his property has to be applied to the payment of his debts, it is evident that his will is annulled, because there is no property on which it is to act; but this

⁷⁷ A will at Rome was considered as a law, which derogated in the particular case from the intestate law, the latter of which obtained its force only when there was no will. And as it required the same form to repeal a law as to make one, the same rule was applied to a testament. Ricard, des Donations, partie, 3, n. 121.

⁷⁸ Reid v. Borland, 14 Mass. 208; Laughton v. Atkins, 1 Pick. Mass. 535; Lewis v. Lewis, 2 Watts & S. Penn. 455; Deakins v. Hollis, 7 Gill & J. Md. 311; Delafield v. Parish, 25 N. Y. 9; Blanchard v. Blanchard, 32 Vt. 62; Kent v. Mahaffey, 10 Ohio St. 204; Heise v. Heise, 31 Penn. St. 246. But see Clark v. Ehorn 2 Murph. No. C. 235; Smiley v. Gambill, 2 Head, Tenn. 164.

⁷⁹ See Brant v. Wilson, 8 Cow. N. Y. 56.

⁸⁰ Epps v. Dean, 28 Ga. 533; Wells v. Wells, 35 Miss. 638; Clingan v. Mitcheltree, 31 Penn. St. 25.

⁸¹ Skerrett v. Burd, 1 Whart. Penn. 246; Harrington v. Budd, 5 Den. N. Y. 321.

⁸² Dister v. Dister, 3 Lev. 108; Darley v. Darley, 3 Wils. 6; Goodtitle v. Otway, 1 Bos. & P. 576; 7 Term, 399. See 4 Kent, Comm. 529, 530, 4th ed.; Powell, Dev. 565 to 570.

must be understood as applying only to the devisees or legatees, for the will retains its full force as regards the executors who are to administer the assets and pay the debts to their full extent.

2156. When a thing is specifically given by will, and, by any accident, it is *lost or destroyed*, the will is revoked *pro tanto*. If a man bequeath to his son his horse Bucephalus, and also one hundred dollars in cash, if the horse dies the legatee will have no claim on the executor for another horse, as he would if the bequest had been simply of a horse without designating any particular animal; and the legatee will be entitled only to one hundred dollars.

2157. Another mode of revoking a will is by *burning, cancelling, tearing, or obliterating* the instrument, *animo revocandi*, for if it be destroyed merely by accident, without any intention to revoke it, the contents of it may be proved.⁸⁵ But the slightest cancelling, *animo revocandi*, will operate as a cancellation and revocation of the will.⁸⁴

The presumption of law is that the tearing and destruction are done *animo revocandi*; the presumption may be repelled, however, by showing the *animus* did not exist. A rule has been established in relation to dependent relative revocations, in which the act of cancelling being done with reference to another act, meant to be an effectual disposition, will or will not, according to the relative act, be efficient or inefficacious;⁸⁶ as, where a man made a second will, to the use of the same persons to whom he had devised the land by the first will, with a variation only in the name of one of the trustees; but which second will was not good, because not duly attested according to the statute of frauds. After so executing the second will, he cancelled the first by tearing off the seal; one question was whether the cancelling of the former will was a revocation thereof within the statute of frauds, and it was held it was not.⁸⁶

2158. A will is *lapsed* or revoked *pro tanto* by the death of the devisee before that of the testator, or before the condition upon which the devise or bequest has been made has been performed, or before the time when the estate has been directed to vest has arrived.⁸⁷

2159. In Connecticut, Maine, Maryland, Massachusetts, Pennsylvania, Rhode Island, New York, and probably other states, if the devisee or legatee dies in the lifetime of the testator, his lineal descendants are entitled to his share, unless the will anticipates and provides for the case.⁸⁸

2160. A distinction has been made between a lapsed devise of real estate and a lapsed legacy of personal estate. The real estate which is lapsed does not fall into the residue, unless so provided by the will, but descends to the heir at law as if it had never been devised; on the contrary, lapsed personal property passes by the residuary clause where it is not otherwise disposed of.⁸⁹ The reason assigned for this difference is that a bequest of personal property refers to the state of the property at the time of the death of the testator, and that a devise operates only on land of which the testator was seised when he made his will; and it is not to be presumed he intended to devise by a residuary clause, a contingency which he could not have foreseen, nor to embrace in it lands con-

⁸⁵ Jackson v. Holloway, 7 Johns. N. Y. 394; Dan v. Bowen, 4 Cow. N. Y. 483.

⁸⁴ Dan v. Bowen, 4 Cow. N. Y. 483; Smock v. Smock, 3 Stockt. Ch. N. J. 156; Lawyer v. Smith, 8 Mich. 411.

⁸⁶ Powell, Dev. by Jarman, 600.

⁸⁷ Onions v. Tyrer, 2 Vern. Ch. 742; Prec. Chan. 459; 1 Saund. 279, c; Powell, Dev. 600; Ex parte Ilchester, 7 Ves. Ch. 879.

⁸⁸ Bacon, Abr. *Legacy*, E; Comyn, Dig. *Chancery*, 3, Y, 13; Lowndes, Leg. 408 to 415; 1 Roper, Leg. 319 to 341.

⁸⁹ 4 Kent, Comm. 526, 4th ed.

⁹⁰ Woolmer's estate, 3 Whart. Penn. 477; Brown v. Higgs, 15 Ves. Ch. 709; Leake v. Robinson, 2 Mer. Ch. 393.

tained in a lapsed legacy.⁸⁰ How far the alteration of the law of those states where after-acquired lands may be devised will destroy this distinction it is difficult to say.

2161. A legacy is *adeemed* when it is taken away by the testator expressly or by implication; as, for example, when a father makes a provision for a child by his will, and afterward gives to such child, if a daughter, a portion in marriage; or if a son, a sum to establish him in life, provided such portion or sum of money be equal or greater than the legacy.⁸¹

2162. A rule founded in justice and the natural affections has been established, that a *marriage and birth of a child*, after the testator made his will, is a revocation of it, provided the wife and child are unprovided for and the whole estate has been disposed of to their exclusion. This operates as well on real as personal property.

In England, this rule is said to have been of modern origin;⁸² but it seems to be firmly established. By the civil law the birth of a posthumous child was an implied revocation of a will.⁸³ In this country we have numerous statute regulations on the subject, and generally, when a man marries, or when a child is born after he makes his will, he is considered as dying intestate, as to the wife he may have thus taken and the children so born; though in some of them the birth of a child, after making the will, is no implied revocation. In some of them such circumstances operate as a total revocation; in others, a revocation *pro tanto*.⁸⁴

The will of a woman who afterward marries, we have seen, is revoked by the marriage, because the marriage does not leave the wife free to alter it; and it is against the nature of a will to be absolute during the testator's lifetime.

2163. A testament may be *annulled* if the forms prescribed by law for its validity have not been observed. It may also be declared null if the testator or devisee were incapable, one to devise and the other to take; what these incapacities are has already been explained. And the defects or vices which are sufficient to cause contracts to be annulled are, *a fortiori*, sufficient to cause a testament to be avoided, which ought to emanate from the will of the testator, and which, too often, is made when the testator is most easily surprised, and induced to make a will which freely he would not have made.

The principal causes for annulling a will formally made are fear or duress, and fraud.

2164. *Duress* has already been defined,⁸⁵ and here it is only necessary to state its effect. When it can be shown that force has been used to compel a testator to make a will, it cannot be doubted that although all the formalities required by law have been complied with, and the party was perfectly in his senses at the time of making the will, yet it can never stand.⁸⁶ But less violence than that will be sufficient to destroy the efficacy of a will; if, at the time of bequeathing, the testator has any just fear of injury, he could not enjoy that freedom which the law requires he should possess. It must, however, be understood that it is not every fear, or a vain fear, that will have the effect of annulling the will; but a just fear, without which the testator would not have made the will as he did.⁸⁷

⁸⁰ *Gore v. Stevens*, 1 Dan. Ky. 207; *Doe v. Underdown*, Willes, 293; *Green v. Dennis*, 6 Conn. 292; *Lingan v. Carrol*, 3 Harr. & McH. Md. 333.

⁸¹ Fonblanque, Eq. 368, *et seq.*; 1 Vern. by Raithby, 85, n.

⁸² 1 Williams, Wills, 105.

⁸³ Inst. 2, 13, 1.

⁸⁴ *Young's Appeal*, 39 Penn. St. 115; *Phaup v. Woolbridge*, 14 Gratt. Va. 332; *Tyler v. Tyler*, 19 Ill. 151.

⁸⁵ Before, 582.

⁸⁶ *Mountain v. Bennett*, 1 Cox, Ch. 355.

⁸⁷ *Godolphin*, Orph. Leg. part 8, c. 25, s. 8; 5 Toullier, n. 704

It is also to be borne in mind that the circumstances of the parties affect the question, and that threats, which would be idle when addressed to a well man in the prime of life, may well be calculated to overcome the mind of a sick or aged person.⁹⁸

2165. *Fraud*, which annuls every thing, will of course render a testament void, although it may be clothed with all the forms; and, indeed, more care is usually taken to be particularly formal when there is fraud.

But we have seen that using influence over a testator by suggesting to him what he ought to do may or may not be fraudulent; when used for a fraudulent purpose, they avoid a will.⁹⁹ The sort of influence which will invalidate a will is thus described by a learned judge:¹⁰⁰ "There is another ground, which, though not so distinct as actual force nor so easy to be proved, yet if it should be made out, would certainly destroy the will; that is, if a dominion was acquired by any person over a mind of sufficient sanity for general purposes, and of sufficient soundness and discretion to regulate his affairs in general, yet if such dominion or influence were acquired over him as to prevent the exercise of such discretion, it would be equally inconsistent with the idea of a disposing mind."¹⁰¹

The character and degree of the influence which must have been exercised to avoid a will are thus stated by a learned writer:¹⁰²

The influence must be such as to destroy the freedom of the testator's will, and thus render his act obviously more the offspring of the will of others than his own.¹⁰³

It must be specially directed toward the object of procuring a will in favor of particular parties.¹⁰⁴ If any degree of free agency or capacity remained in the testator, so that when left to himself he was capable of making a valid will, then the influence which so controls him as to render his making a will of no effect must be such as was intended to mislead him to the extent of making a will essentially contrary to his duty,¹⁰⁵ and it must have proved successful to some extent certainly.¹⁰⁶ The terms fraud and undue influence are applied without any material difference of significance in many cases, the difference being that undue influence embraces some cases not strictly covered by fraud.¹⁰⁷

2166. By *republication* is meant an act done by a testator from which it can be concluded that he intended an instrument which had been revoked by him should operate as his will, or it is the re-execution of a will by the testator with a view of giving it full force and effect.

2167. A republication may be made in various ways: by a re-execution of

⁹⁸ *Goble v. Grant*, 2 Green, Ch. N. J. 629; *Morris v. Stokes*, 21 Ga. 552; *Sutton v. Sutton*, 5 Harr. Del. 459; *Noble v. Enos*, 19 Ind. 72.

⁹⁹ Before, **2119**; *Means v. Means*, 5 Strobb. So. C. 167; *Davis v. Calvert*, 5 Gill & J. Md. 269; *Taylor v. Wilburn*, 20 Mo. 306.

¹⁰⁰ *Eyre, C. B.*, in *Mountain v. Bennett*, 1 Cox, Ch. 355.

¹⁰¹ See *Miller v. Miller*, 3 Serg. & R. Penn. 267; *Small v. Small*, 4 Me. 220.

¹⁰² *Redfield, Wills*, 524.

¹⁰³ *Williams v. Garde*, 1 Hagg. Eccl. 181; *O'Neill v. Farr*, 1 Rich. So. C. 80; *Moritz v. Brough*, 16 Serg. & R. Penn. 403; *Blakey v. Blakey*, 33 Ala. N. S. 611; *Small v. Small*, 4 Me. 223.

¹⁰⁴ *Duffield v. Robeson*, 2 Harr. Del. 384, *Newhouse v. Goodwin*, 17 Barb. N. Y. 236; *Florey v. Florey*, 24 Ala. N. S. 241. General bad treatment of a husband by a wife will not avoid a will made by him in her favor. *McMahan v. Ryan*, 20 Penn. St. 329; *Balton v. Watson*, 13 Ga. 63; *Jenckes v. Cant*, 2 R. I. 255; *Redfield, Wills*, 524.

¹⁰⁵ *Lide v. Lide*, 2 Brev. So. C. 403; *Trumbull v. Gibbons*, 2 Zab. N. J. 117; *Neel v. Potter*, 40 Penn. St. 483; *Eckert v. Flowry*, 43 *id.* 46; *Lowe v. Williamson*, 1 Green, Ch. N. J. 82.

¹⁰⁶ *Wright v. Howe*, 7 Jones, No. C. 412.

¹⁰⁷ *Collins v. Hope*, 20 Ohio, 492; *Nussear v. Arnold*, 13 Serg. & R. Penn. 323; *Davis v. Calvert*, 5 Gill & J. Md. 269.

the will, that is, signing it and causing the witnesses to sign it; but it has been decided that the mere declaration of the testator that he republished his will and causing the witnesses to subscribe their names to it as witnesses is sufficient, though it is not then signed by the testator.¹⁰⁸ And in Pennsylvania, where a will need not be attested by witnesses, but proved by evidence of the hand writing of the testator, the republication may be by parol, but such republication must be proved by two witnesses, as in the case of an original publication.¹⁰⁹

A will may also be republished by a codicil which refers to it; as, "I hereby ratify and confirm my said will, except in the alterations after mentioned;"¹¹⁰ and although the reference may be imperfect, if the inaccuracy is not such as to prevent the certainty of the will, such imperfection will not be fatal.¹¹¹ When a reference is made to a will, if no express date is mentioned, the codicil will be presumed to refer to the last.¹¹²

The republication must be made *animo republicandi* by the testator. For example, when the testator was in search of another paper, and a person who was assisting him took up the will by mistake, whereupon the testator said, "that is my will," this was held not to amount to a republication.¹¹³

2168. A republication of a will establishes it fully, as if it had never been revoked; and, indeed, it gives greater efficacy, for when it disposes of all the testator's lands, it will carry all after-purchased lands of which the testator was seised at the time of the republication.¹¹⁴

And upon the same principle, if one give to Sarah, his wife, a piece of plate, or other thing, and at that time he has no wife, but afterward he marries one of that name and then republishes his will, the wife will be entitled to the bequest. Again, if a testator devise the horse which he owns to the legatee, and at the time of making the will he had no horse, but afterward bought one and then republished his will, the legatee would be entitled to the horse.¹¹⁵ In these cases the republication is the same as making a new will, and its effect is to extend to subjects which have arisen between its date and republication.

The republication of it makes a will speak as if it were made at the time of republication. In fact, it makes it a new will; and upon the principle that the last is the best, the will republished is to be considered as the last, although there may then exist several of a later date.¹¹⁶ But there is a marked distinction between wills and codicils in this respect; for as every codicil in construction of law is a part of the will, a testator by expressly referring to and confirming the will is not to consider it as intending to set it up against a codicil or codicils, revoking it in part.¹¹⁷

2169. When a will is made and a person is appointed to manage the estate of the testator, such a person is called an *executor*, *executor testamentarius*. When no such person is appointed by the will, or when no will is made, a person is appointed by a civil officer, known by different names in the several states, to administer, manage, and settle the estate of the deceased, who is called an *administrator*.¹¹⁸ Though their powers are generally similar, yet they differ in some respects.

¹⁰⁸ Reynolds v. Shirley, 7 Ohio, 39.

¹⁰⁹ Jones v. Hartley, 2 Whart. Penn. 103; Musser v. Curry, 3 Wash. C. C. 481.

¹¹⁰ Com. 381.

¹¹¹ Rogers v. Pettis, 1 Add. Eccl. 38.

¹¹² Crosbie v. MacDoual, 4 Ves. Ch. 615.

¹¹³ Abney v. Miller, 2 Atk. Ch. 599. See Burns v. Burns, 4 Serg. & R. Penn. 295.

¹¹⁴ Luce v. Dimock, 1 Root, Conn. 82; Jackson v. Holloway, 7 Johns. N. Y. 394; Parker v. Cole, 2 J. J. Marsh. Ky. 503; Girard v. Mayor, 4 Rawle, Penn. 323.

¹¹⁵ Wentworth, Off. Ex. c. 1, p. 62.

¹¹⁶ Serocold v. Hemming, 2 Cas. temp. Lee, 490; 1 Add. Eccl. 38.

¹¹⁷ Crosbie v. MacDoual, 4 Ves. Ch. 610.

¹¹⁸ The rights, powers, and duties of administrators have been considered when treating of the title derived from intestacy. Before, 1544.

In discussing this subject we will inquire into the appointment of executors, the capacity of persons to serve as executors, the kind of executors, their number, the interest of the executors, their powers and duties, and their liabilities.

2170. The executor is *appointed* by the will by an express clause to that effect. But although that is usual, it is not indispensably necessary, for he may be so appointed by construction, and then he is called an executor according to the tenor; as, when the testator by circumlocution recommends or commits to one or more the charge and office, or other rights which appertain to an executor, it amounts to as much as constituting him or them to be executors. The following are examples where the testator said: "I appoint my nephew my residuary legatee to discharge all lawful demands against my will;"¹¹⁹ "I make A B lord of all my goods;"¹²⁰ "I make my wife lady of all my goods."¹²¹

2171. In general, all persons qualified to make wills may be executors, and some others beside. A feme covert and an infant may be executors, although they are unable to make a will. An alien friend may be an executor, though it may be doubted whether an alien enemy, while he continues such, can act in that capacity.¹²²

But it is to be observed that when a wife is appointed executrix, the consent of the husband, express or implied, must be had, because, when he dissents, she cannot act, for this good reason, that he would be liable for her devastavit. On the other hand, she cannot be compelled to act, although the husband consents.

Perhaps few or no persons are disqualified from acting as executors on account of their crimes, unless they become, in consequence of a judicial sentence, civilly dead. In England, where outlawry is allowed, an outlaw may sue as executor, because he sues in *auter droit*.

Whether a corporation could be an executor seems to have been doubted; but in some states such bodies are authorized, at least in certain cases, to act as executors, by legislative provisions.

2172. *Executors*, considered as to the extent of their authority, are general and absolute, or limited and qualified; as to the nature of their appointment, they are instituted or substituted; as to the lawfulness of their appointment, they are rightful executors, or executors *de son* (leur) *tort*.

2173. An executor is *general* and *absolute* when he is constituted certainly, immediately, and without restriction in regard to the testator's effects, or limitation in point of time.

2174. The appointment of an executor may be limited or qualified, or it may be conditional. The qualifications and limitations may be classed as follows:

The appointment may be limited in point of time, for the time may be limited when the person appointed shall begin to exercise his rights, or when he shall cease to be executor; as, if the executor be appointed to act until the testator's children shall attain the age of twenty-one years.¹²³

It may be limited in point of place; as, if one be appointed executor of the testator's goods in Pennsylvania.

The power of the executor may be limited as to the subject matter upon which it is to be exercised; as, when a testator appoints A the executor of his goods and chattels in possession of B, or of all his choses in action. One may be appointed executor of one thing only.¹²⁴ But although a testator may thus appoint separate executors, of distinct parts of his property, and may divide

¹¹⁹ *Grant v. Leslie*, 3 Phill. Eccl. 116.

¹²⁰ Godolphin, Orph. Leg. part 2, c. 5, s. 3.

¹²¹ Swinburne, Wills, part 4, s. 4, pl. 3.

¹²² Bacon, Abr. *Executors*, A, 4.

¹²³ Swinburne, Wills, part 4, s. 17, pl. 4.

¹²⁴ Wentworth, Off. Ex. 29; 3 Phill. Eccl. 424.

their authority, yet *quoad* creditors of the testator they are all executors, and as one executor, and may, therefore, be sued jointly as one executor.¹²⁵

The appointment may be conditional, and the condition may be either precedent or subsequent.¹²⁶

2175. An *instituted executor* is one appointed by the testator without any condition, and who has the first right of acting when there are substituted executors. An example will show the difference between an instituted and a substituted executor: suppose a man makes his son his executor, but if he will not act, he appoints his brother, and if neither will act, his cousin. Here the son is the instituted executor in the first degree, the brother is said to be substituted in the second degree, and the cousin in the third degree, and so on.¹²⁷

2176. A *substituted executor* is one appointed executor if another person who has been appointed refuses to act.

2177. A *rightful executor* is one lawfully appointed by the testator in his will. Deriving his authority from the will, he may do most acts which pertain to his office before he obtains letters testamentary; he may collect debts, give acquittances, sell the personal property, and perform all similar acts, but he must obtain such letters before he can declare in an action brought by him as such; for in his declaration he must make profert of his letters testamentary.¹²⁸ But it is to be observed that when he sues for goods which were in his actual possession, he need not make profert.

2178. An *executor in his own wrong, de son tort*, is one who, without lawful authority, undertakes to act as executor of a person deceased. He is in general held responsible for all his acts, when he does any thing which might prejudice the estate, and receives no advantage whatever in consequence of his assuming the office. He cannot sue a debtor of the estate, but may be sued generally as executor.

A very slight circumstance will render a man executor *de son tort*. It has been held that taking a Bible or a bedstead were sufficient indicia of the person so interfering being the representative of the deceased.¹²⁹ And if he receives a debt due to the deceased, or gives an acquittance for it, or declares in an action, or pleads to it as executor, without lawful authority, when there is no rightful executor or administrator, he will be considered as executor *de son tort*.¹³⁰

But when there is a rightful executor or administrator there can be no executor *de son tort*, for the acts which could render a man such make him a trespasser.¹³¹

The doctrine relating to executors in their own wrong applies only to chattels, for a man cannot be executor *de son tort* of lands.¹³²

2179. Only one executor may be appointed, or there may be any number that the testator may please to appoint. The questions which arise in regard to executors are, What interest they have in the estate of the testator? How far they are liable for each other's acts? and, What are the rights of the survivor?

2180. *Joint executors* are considered as but one person, representing the testator, and, therefore, the acts of any one of them which relate either to the

¹²⁵ Croke, Car. 293.

¹²⁶ Godolphin, Orph. Leg. part 2, c. 2, s. 1; Wentworth, Off. Ex. 23.

¹²⁷ Swinburne, Wills, part 4, s. 19, pl. 1.

¹²⁸ 1 Williams, Ex. 175. In Alabama, and perhaps some other states, an executor has no power to act until he takes out letters testamentary. *Cleveland v. Chandler*, 4 Ala. 489; *Tucker v. Starks*, Brayt. Vt. 99.

¹²⁹ *Toller*, Ex. 38; *Robbins' case*, Noy, 69. See Godolphin, Orph. Leg. part 2, c. 8, s. 1; Swinburne, Wills, part 4, s. 23.

¹³⁰ Comyn, Dig. *Administrator* (C. 1).

¹³¹ Williams, Ex. 151.

¹³² *Ness v. Vanswearingen*, 7 Serg. & R. Penn. 192, 196; 10 *id.* 144.

delivery, gift, sale, payment, possession, or release of the testator's goods, are deemed, as regards the person with whom they contract, the acts of all.¹³³

But the right is confined to such acts, and an executor has no power to confess a judgment without the knowledge or consent of his co-executor, for a claim which was barred by the act of limitations, so as to bind the testator's estate, because, among other valid reasons, there may be evidence in the hands of the other executors, that no such claim exists.¹³⁴

2181. As a general rule, it may be laid down that each executor is liable for his own wrong or *devastavit* only, and not for that of his colleague.¹³⁵ He may be rendered liable, however, for the misplaced confidence he may have reposed in his co-executor; as, if he sign a receipt for money, in conjunction with his co-executor, and he receives no part of the money, but agrees that his co-executor shall retain it and apply it to his own use, this is his own misapplication, for which he is responsible.¹³⁶

An executor is justified in putting money in the hands of his co-executor for a legitimate purpose of the estate when the act is not an imprudent one; as, where an executor living in London delivered money to his co-executor, who had been the confidential agent and attorney of the testator, for the purpose of paying debts in the country where he resided, and the money was lost by his insolvency, it was held that the executor who had so delivered the money should not be charged with the loss.¹³⁷

2182. Upon the death of one of several executors, the survivors or survivor has generally all the powers to administer the personal estate.¹³⁸ But when special powers are given by the testator to all the executors, in relation to the sale of real estate, on the death of some of them the survivors cannot in general act.¹³⁹ In Pennsylvania, the survivor is authorized by act of assembly to perform all such acts.¹⁴⁰

2183. An executor derives his *interest* from the will, and all the property of the testator, from the time of his death, vests in his executor.¹⁴¹ By the common law he has a right to take possession of all choses in possession, and to collect or release choses in action by virtue of the will alone. But he cannot declare or claim a right in a court of law without showing his authority by producing letters testamentary. In some states his right is inchoate only until he has obtained letters testamentary and probate of the will has been made.

2184. The probate of a will is the proof made before an officer appointed by law that an instrument offered to be proved is the act of the person whose last will and testament it purports to be. Upon proof being so made, and security being given where the laws require such security, the officer grants to the executors letters testamentary; or when there are no executors appointed, or they are all dead or incapable of serving, he grants letters of administration

¹³³ Bacon, Abr.; 11 Viner, Abr. 858; Comyn, Dig. *Administration*, B, 12; 1 Dane, Abr. 583; 2 Litt. Ky. 315; 16 Serg. & R. Penn. 337; Rick v. Gilson, 1 Penn. St. 54.

¹³⁴ 6 Penn. St. 267.

¹³⁵ Douglas v. Satterlee, 11 Johns. N. Y. 16; Williams v. Holden, 4 Wend. N. Y. 223; Moore v. Tandy, 3 Bibb, Ky. 97.

¹³⁶ Davis v. Spurling, 1 Russ. & M. Ch. 64; 2 Williams, Ex. 1292; 1 P. Will. Ch. 241, n. 1. See Young v. Wickliffe, 7 Dan. Ky. 447; Johnson v. Corbett, 11 Paige, Ch. N. Y. 265.

¹³⁷ Bacon v. Brown, 5 Ves. Ch. 331. See Chambers v. Minchen, 7 Ves. Ch. 193; Joy v. Campbell, 1 Schoales & L. Ch. Ir. 341.

¹³⁸ Comyn, Dig. *Administration*, B, 12; Hammond, Parties, 148.

¹³⁹ But see Chanet v. Villeponteaux, 3 M'Cord, So. C. 29; Sharp v. Pratt, 15 Wend. N. 610; Taylor v. Galloway, 1 Ohio, 232; Bull v. Bull, 3 Day, Conn. 384; Digges v. Jarman, 4 Harr. & McH. Md. 485; Smith v. Moore, 6 Dan. Ky. 417.

¹⁴⁰ Act of March 12, 1800, 3 Sm. L. 433.

¹⁴¹ Woolley v. Clark, 5 Barnew. & Ald. 744; Sneed v. Hooper, Cooke, Dist. Ct. 200; Overfield v. Bullitt, 1 Mo. 749.

cum testamento annexo, with the will annexed, so that the administrator shall conform himself to the provisions of the will.

The executor, armed with this additional authority, is now fully vested with all the rights of the testator at the moment of his death; and in this capacity he has a complete control of his personal estate, and with such power over the real as the will vests in him. But still he holds as a trustee for the benefit of creditors, legatees, and others who may have an interest in such property.

So complete is his authority that a payment made to him is good, although a later will may afterward be discovered, or even when the paper on which the probate was obtained was a forgery. This decision is made upon the ground that the probate is a judicial act, and while unimpeached, it is binding.¹⁴³

The officer who takes the probate is variously denominated. In some states he is called judge of probate, in others register of wills, and surrogate in others.

2185. In some of the states the probate is conclusive both as to real and personal property; in others it is not conclusive as to land. This is the case in Pennsylvania.

2186. For the purpose of carrying out the intentions of the testator, and to perform the duties incumbent on him, the law has invested him with the power of bringing suits, in his own name, to recover the rights of the testator; and in order to enable others to obtain their just rights from him, he may be sued for debts due by the testator, and, on a judgment against him, the assets in his hands will be liable.

2187. In the performance of his duties he is required to act in good faith and to use due diligence.¹⁴³ His principal duties are the following:

To bury the testator in a manner suitable to the estate he leaves behind him; and when there is reason to believe he died insolvent, he is not warranted in expending more in funeral expenses than is absolutely necessary.

It is not easy to gather from the numerous cases decided on the subject what will be allowed for funeral expenses. Courts of equity have taken into consideration all the circumstances of each case, and when executors have acted with common prudence and in obedience to the will, their expenses have been allowed. In a case where the testator directed that he should be buried in a church thirty miles distant from the place of his death, the sum of sixty pounds sterling was allowed;¹⁴⁴ and in another, under peculiar circumstances, an allowance of six hundred pounds was made.¹⁴⁵ In Pennsylvania, where the deceased left a considerable estate and no children, the sum of two hundred and fifty-eight dollars and seventy-five cents was allowed, the greater part of which was expended in erecting a tombstone over a vault in which the body was interred.¹⁴⁶

To collect the goods of the deceased without unnecessary delay, provided he can do so peaceably; when resisted, he must apply to the law for redress.

The executor is bound to prove the will in the proper office, before the officer appointed by law. This is required in order to give him complete authority. Should he decline to do so, the officer who has jurisdiction of the matter can compel him either to prove the will or to renounce.

He is required to make an inventory of all the goods and chattels which come to his hands, and file it in the office where the probate has been made.¹⁴⁷ This is as well for his own security as for the safety of the creditors and legatees who are entitled to such goods.

¹⁴³ *Allen v. Dundas*, 3 Term, 125; *Foster v. Brown*, 1 Bail. So. C. 221.

¹⁴⁴ *Kee v. Kee*, 2 Gratt. Va. 116.

¹⁴⁵ *Stag v. Punter*, 3 Atk. Ch. 119.

¹⁴⁶ *Prec. Chanc.* 29.

¹⁴⁷ *Appeal of Ann McGlinsey*, 14 Serg. & R. Penn. 64.

¹⁴⁷ *Griswold v. Chandler*, 3 N. H. 492; *Scott v. The Governor*, 1 Mo. 686.

The inventory is a list, schedule, or enumeration in writing, containing, article by article, a description of the goods and chattels, rights and credits of the testator. In the enumeration of the debts due to the testator, those debts which are sperate should be separated from those which are desperate, for if they are all returned without any distinction the executor may be required to show that a debt is desperate, whereas, if it be returned as such, the presumption will be that it is so, and proof of its character will lie upon those who affirm it is good.¹⁴⁸

He should ascertain the state of debts and credits of the estate, and endeavor to collect all such claims with as little delay as possible consistently with the interest of the estate.

He should advertise for debts and credits. As he is not bound to pay the debts until after the end of one year from the time he began to act, he should during this time ascertain all the debts due by the testator at the time of his death. If he should incautiously pay a debt in full, and then find that he had not assets to pay all the debts, he would be the loser of the amount he had paid beyond what the creditor would have been entitled to. In the advertisement he should not promise to pay the debts of the testator, but simply require the creditors to present them for consideration. He should cautiously abstain from making any engagement to pay the debts of the testator, or he may be made personally liable; as, where the testator died indebted to A, and the executors incautiously signed an agreement endorsed on A's account as follows: "Mr. A having consented to wait for the payment of the within account, we, as executors of B, engage to pay Mr. A interest on the same at the rate of five per centum until the same is settled," it was held that the executors were personally liable to pay the debt and interest because the original debt did not carry interest against the estate, and therefore the engagement is considered as personal.¹⁴⁹

He should reduce the whole of the goods not specifically bequeathed into money with all due expedition.

He is bound to keep the money of the estate in bank, but not mixed with his own account, or he may be charged interest on it.

An executor must be at all times ready to account, and actually file an account in the proper office within a year.

He is bound to pay the debts of the testator and the legacies bequeathed by him in the order required by law.

2188. Executors are of course liable for all the assets which come to their hands belonging to the estate of the testator, and they are required to account for them. In general, this account is to be rendered to the officer before whom the will is proved.

But executors become accountable frequently where they have not received any property in consequence of their acts. They are personally liable upon the contracts of the testator when for a sufficient consideration they promise to pay them;¹⁵⁰ and they may be made responsible when, from their neglect to sue¹⁵¹ or to sell property,¹⁵² a loss occurs to the estate; but when they act with ordinary prudence in these cases, they will not be made liable for such a loss. And keeping money idle when it could have been employed and made to bring interest is a *devastavit*.¹⁵³

¹⁴⁸ 1 Chitty, Pr. 520; 2 Williams, Ex. 6441; Toller, Ex. 248.

¹⁴⁹ Bradley v. Heath, 3 Sim. Ch. 543.

¹⁵⁰ Sims v. Stillwell, 4 Miss. 176; Hopkins v. Morgan, 7 T. B. Monr. Ky. 1; Sleighter v. Harrington, 2 Murph. No. C. 332.

¹⁵¹ Jennings v. Weeks, 1 Rice, So. C. 453.

¹⁵² Estate of Secondo Basio, 2 Ashm. Penn. 437; Griswold v. Chandler, 5 N. H. 492.

¹⁵³ Slade v. Slade, 10 Vt. 192; Callaghan v. Hill, 1 Serg. & R. Penn. 241. See Karr v. Karr, 6 Dan. Ky. 3.

They are bound to administer the assets, and not to trade with them. Where an executor trades with the assets, the law holds him responsible for all the losses which he may sustain, and the profits he makes, should he make any, belong to the estate; this rule is adopted to prevent frauds.¹⁵⁴

The will is the law of the executors. They are, therefore, bound to invest the assets as it directs, and a departure from its direction will render the executors liable for any loss that may occur.¹⁵⁵

Executors are not only bound to administer the assets, but to administer them according to the provisions of the law. They must, therefore, pay the debts in the order prescribed by law, and any deviation in this respect will make them responsible to such creditors as may be postponed by such mispayment.¹⁵⁶

¹⁵⁴ *Callaghan v. Hill*, 1 Serg. & R. Penn. 241.

¹⁵⁵ *Nyce's Estate*, 6 Watts & S. Penn. 254.

¹⁵⁶ *Swift v. Miles*, 2 Rich. Eq. So. C. 147.

CHAPTER XXIX.

TITLE TO REAL ESTATE BY OCCUPANCY, PRESCRIPTION, AND CUSTOM.

- 2189. Title by occupancy.
- 2192-2205. Title by prescription.
- 2195-2197. General rules of prescription.
 - 2195. Nature and origin of the right.
- 2196, 2197. The conditions requisite.
 - 2197. Adverse possession.
 - 2198. The time required to gain a title by prescription.
 - 2199. To what things title may be gained by prescription.
- 2200-2202. The parties to a prescription.
 - 2201. By whom prescription may be acquired.
 - 2202. Against whom prescription may be acquired.
 - 2203. The right by which a prescription is claimed.
 - 2204. The operation of the statute of limitations.
 - 2206. Title by custom.

2189. There was formerly also in English law a right by *occupancy* which arose where a tenant for the term of another life without words of inheritance died during the pendency of the other life. The first person to enter and occupy might hold during the life of the *cestui que vie*. This right was abolished by Stat. 29 Car. II, c. 3, and 14 Geo. II, c. 10, in England, and it is believed never obtained in this country.¹

2190. All the lands in this country were originally vested in the United States, or in some one of them; no person can, therefore, have any right by occupancy in such lands; for it is a principle of law, of universal application, that no prescriptive or customary right can be acquired against the government. Persons known as squatters, who take possession of any of the unoccupied lands of the general or of any state government, gain no title to such lands.

2191. When considering the things which are the objects of property, we stated to whom an island belongs when formed out of the sea, or when it arises in rivers.² It is clear that a stranger cannot claim such island by occupancy and appropriate it to himself.

2192. Another method of acquiring title to real estate is by prescription. *Prescription*, in one sense, is the act of acquiring real property by a long, honest, and uninterrupted possession or use during the time required by law; and in another sense, this word signifies the extinction of a right to such property by permitting it to lie dormant during the same time. The first may be denominated a positive and the last a negative prescription.

2193. By the civil or Roman law, a positive prescription was designated by the name *usucapio*, or *usucapion*, from the circumstances that the person who acquired property in this manner might be said *usu rem capere*. In some of the states of the Union the act of limitations is of the same nature, and has some

¹ 2 Blackstone, Comm. 258; 1 Washburn, Real Prop. 93, 94.

² Before, 434.

of the effect of the usucapion of the civil law.³ And in some states it is said the doctrine of prescription has not been adopted.⁴

2194. Negative prescription, on the contrary, has no direct operation upon the rights of property; it is applied only to the remedies. It is therefore rather an exoneration than an acquisition.

We will consider, first, the general rules of prescription, second, the time required to gain a title by prescription, third, the things to which a title can be gained, fourth, the parties to a prescription, fifth, the right by which a prescription is claimed, and, sixth, the operation of the statutes of limitations.

2195. The law secures to the owner of an estate the rights which he has, upon condition that he will at all times assert them, so as not to induce another to fall into an error respecting them. If, for a sufficient length of time, he neglects them, so as to put in peril the rights of another, he will not be allowed to reclaim them. The possessor who has, *bona fide*, acquired his possession, perhaps for a valuable consideration, or received it as an inheritance from his ancestors, and who, had the former owner manifested an intention to establish a right, might have acquired another estate, and not improved the one he holds, has a right superior to such claimant.

The law raises the just presumption that when the owner has for a long time neglected his rights without any good reason to prevent him from asserting them, he has abandoned them, and that the possessor has acquired such rights by a grant from the former owner. This is perfectly just, both on account of the parties, and for the purpose of protecting society from the disorders which would arise did a different rule prevail.⁵

2196. As the right of prescription is presumed to rest upon a grant, which may have been lost, the possessor who claims title by this right is required to show distinctly, first, the use and occupation or enjoyment of the right in question; secondly, the identity of the thing enjoyed; and, thirdly, that such enjoyment has been adverse to the right of some other person.⁶

2197. Let us examine these a little more in detail.

There must be an *adverse possession*. By this is understood the enjoyment of land, or such estate as lies in grant, under such circumstances as indicate that such enjoyment has been commenced, and continued, under an assertion of rights on the part of the possessor, to the exclusion of another who claims to have a title.

But it is not every possession which is adverse; a man may hold apparently adversely to another, and yet this tenure may not have that effect. There are four general rules by which it may be ascertained that possession is not adverse; these will be separately considered.

When both parties claim under the same title; as, if a man seised of certain lands in fee have issue two sons and die seised, and one of the sons enter by abatement into the land, the entry is not adverse; for when the abator entered into the land of his father, before entry made by his brother, the law intends that he entered claiming as heir to his father, by which title the other son also claims.⁷

³ Angell, Lim. 18.

⁴ Allen v. Stevens, 5 Dutch, N. J. 509.

⁵ Odiorne v. Wade, 5 Pick. Mass. 421; Gayetty v. Bethune, 14 Mass. 49; Sumner v. Tileston, 7 Pick. Mass. 198; see Branch v. Doane, 17 Conn. 402; Strickler v. Todd, 10 Serg. & R. Penn. 69; Kingston v. Lesley, 10 Serg. & R. Penn. 390; Nitzell v. Paschall, 3 Rawle, Penn. 82; Butz v. Ihrie, 1 Rawle, Penn. 218; Yeakle v. Nare, 2 Watts, Penn. 123; Esling v. Williams, 10 Penn. St. 126; Young v. Collins, 2 Browne, Penn. 292; Sumner v. Murphy, 2 Hill, So. C. 488; Simmons v. Parsons, 2 Hill So. C. 492; Stodden v. Powell, 2 Ala. 287.

⁶ Lawton v. Rivers, 2 M'Cord, So. C. 445; Lajoie v. Primm, 3 Mo. 529.

⁷ Coke, Litt. s. 396.

When the possession of one party is consistent with the title of the other; as, where the rents of a trust estate were received by a *cestui que trust* for more than twenty years after the creation of the trust, without any interference of the trustee, such possession being consistent with and secured to the *cestui que trust* by the terms of the deed, the receipt was held not to be adverse to the title of the trustee.⁸

When, in contemplation of law, the claimant has never been out of possession; as, where Paul devised lands to John and his heirs, and died, and John also died, and afterward the heirs of John and a stranger entered, and took profits for twenty years; upon an ejectment brought by the devisee of the heir of John against the stranger, it was held that the perception of the rents and profits by the stranger was not adverse to the devisee's title; for, when two men are in possession, the law adjudges it to be the possession of him who has the right.⁹

When the occupier has acknowledged the tenant's title; as, if a lease be granted for a term, and, after paying the rent for the land during such term, the tenant hold for twenty years without paying rent, his possession will not be adverse; for, when a man commences his possession in right of another, he will be presumed to hold by the same right.¹⁰

A mere declaration of adverse possession gives no right;¹¹ to constitute adverse possession there must be *pedis possessio*, or a substantial enclosure; but an artificial fence, or other erection, is not indispensable. A river, mountain, or continued ledge of rocks, by which the intrusion of cattle is prevented, is sufficient.¹²

As fraud vitiates everything, to gain a right by possession the party must have entered *bona fide*.¹³

But although the possessor may have entered *bona fide*, and he may have holden by an adverse possession, yet this possession must have been continued uninterruptedly, or he will not gain a right by prescription. By interruption is meant some act or circumstance which stops the course of prescription or act of limitations.

The interruption of the use of a thing is natural or civil. A physical or natural interruption takes place when the owner regains the possession of the estate so as to eject the wrongful possessor. This takes place when the owner enters into the land and turns out the possessor before he has acquired a right by prescription.

Civil interruption is that which takes place by some judicial act; as, the commencement of a suit to recover the land in dispute, which gives notice to the possessor that the thing which he possesses does not belong to him. When the title has once been gained by prescription, it will not be lost by interruption of it unless such interruption be continued long enough to gain title by prescription. When the interruption takes place before the right has been acquired, it merely suspends the acquisition and the time from running. Such interruption renders useless the time which has preceded, and the possessor must commence anew in order to gain a title by prescription.

Natural interruption has a general effect with respect to the claims of all men. The reason of this is that by it one of the essential requisites for prescription, namely, possession, ceases in fact, therefore prescription cannot take

⁸ 8 East, 248.

⁹ Ld. Raym. 329.

¹⁰ See *Medford v. Pratt*, 4 Pick. Mass. 222; *Gloucester v. Beach*, 2 Pick. Mass. 60, n; *Kirk v. Smith*, 9 Wheat. 241.

¹¹ *Shepley v. Lytle*, 6 Watts, Penn. 500.

¹² *Bailey v. Irby*, 2 Nott. & M'C. So. C. 343.

¹³ *Jackson v. Halstead*, 5 Cow. N. Y. 216; *Livingston v. Peru*, 9 Wend. N. Y. 511.

place at all, nor, consequently, against any one person more than another. But the effect of civil interruption, or interruption in law by action, is not general, but relative. So soon as a claim to the property is brought into court, the possessor is bound to relinquish it if the claim be made good, and that obligation necessarily deprives him of the right of acquiring the property by prescription as against that claimant. The obligation toward that claimant, however, cannot produce any legal effect with respect to other persons. Besides, *lex civilis vigilantibus scripta est*, and while the claimant must not be deprived of the benefit of his vigilance and activity, which enable him to claim before the right acquired by prescription was completed against him, there is no reason why his vigilance should benefit others who were not so vigilant.

2198. By the old English law, to obtain a title by prescription it was necessary to hold "the time whereof the memory of man runneth not to the contrary," which time commenced at the beginning of the reign of Richard I. This time being beyond the settlement of this country, it is evident there can be no prescription in this sense. In modern times, upon proof of an *adverse, exclusive, and uninterrupted enjoyment of a right for twenty years* and upward, unexplained, a jury may be directed to presume a right by grant or otherwise.¹⁴ When, however, there are circumstances which explain this apparent acquiescence, the right will not be acquired.¹⁵

2199. Blackstone lays it down "that nothing but incorporeal hereditaments can be claimed by prescription, as a right of way, a common, etc." But no prescription can give title to lands and other corporeal substances of which more certain evidence may be had.¹⁶ Bracton, on the contrary, following the doctrine of the civil law, seems to consider it as alike effectual with respect to corporeal and incorporeal property. In this country this latter doctrine seems to prevail.¹⁷ But when there is a mere possession, unaccompanied by other evidence which affords a presumption of title, a distinction has been introduced, by reason of the statute of limitations, between corporeal subjects, such as lands, and things incorporeal. As a grant of land confers an entire title, it cannot be presumed from mere possession alone for any length of time short of that prescribed by the statute of limitations. The reason assigned for this is that with respect to corporeal hereditaments, the statute has made all the provisions, and has thereby taken these cases out of the operation of the common law.¹⁸ It is a rule that what is to arise by matter of record cannot be prescribed for, but must be claimed by grant entered on record.¹⁹

2200. The *parties* to a prescription are two, and we will consider by whom prescriptions may be acquired, and against whom.

2201. All persons *sui juris* may acquire a title by prescription, but a pre-

¹⁴ 2 Saund. 175, a; Story v. Odin, 12 Mass. 159; Gayetty v. Bethune, 14 Mass. 49, 55. In Missouri it was held that there could not be a prescription, between private individuals, short of thirty years, unless the title commenced in a fair and formal manner. Lajoie v. Primm, 3 Mo. 529. To claim land by length of possession, in Tennessee, there must have been seven years' peaceable possession, under color of title. Patton v. Hynes, Cooke, Dist. Ct. 356; McIver v. Reagan, *id.* 366; 2 Wheat. 25; see Strickler v. Todd, 10 Serg. & R. Penn. 69; Newman v. Rutter, 10 *id.* 509; Kingston v. Lesley, 10 *id.* 390; Young v. Collins, 2 Browne, Penn. 293; Worrall v. Rhoads, 2 Whart. Penn. 427; McElroy v. The Rail Road, 7 Penn. St. 536; Esling v. Williams, 10 Penn. St. 126. The courts are inclined to adopt the periods mentioned in the statutes of limitations, in all cases analogous in their principles. Ricard v. Williams, 7 Wheat. 110; Coolidge v. Learned, 8 Pick. Mass. 504; Melvin v. Whiting, 10 Pet. 295.

¹⁵ Before, 1620. See Daniel v. North, 11 East, 372.

¹⁶ 2 Sharswood, Blackst. Comm. 264.

¹⁷ Melvin v. Proprietors, 16 Pick. Mass. 137; Ricard v. Williams, 7 Wheat. 109.

¹⁸ 1 Greenleaf, Ev. § 17.

¹⁹ 2 Sharswood, Blackst. Comm. 265.

scription must always be laid in him who is the tenant of the fee. Tenants for life, for years, or at will cannot prescribe by reason of the imbecility of their estates.²⁰ When the title has been granted by one who had possession to another person, or the right has descended, the time of enjoyment by those in privity with the claimant, as in the relation of heir and ancestor, or grantor and grantee, may be joined.²¹

2202. A title by prescription may be acquired against strangers, against co-tenants, but not against the public.

When there is no privity or any connection whatever between the possessor and the claimant, and the former has held the land or used the easement adversely, exclusively, and uninterruptedly for twenty years, little difficulty can occur. Upon proof of these facts the possessor will establish his title, unless the claimant at the time labored under some of the disabilities mentioned in the statutes of limitations.

Although when a man who has a title with another enters on the land, he is presumed to enter by virtue of the joint title, and to hold for himself and his co-tenant, yet, when he manifests an intention not to hold for himself and his companion, but adversely to the latter's rights, he will gain a title by such adverse possession; as, where he takes the profits and claims the whole adversely for twenty-one years exclusively, the jury will be directed to presume an ouster, though none be proved.²²

No prescription can in general be acquired against the public, and no length of possession will alone give a right to the possessor against the state.²³

2203. The *right* by which a prescription is claimed is of two kinds: it is personal when exercised by one in his own right or who has derived it from his ancestors or by a corporation; it is then called a prescription in the person; or else it is attached to the ownership of a certain estate, and therefore it is denominated a prescription in a *que estate*. The latter must always be laid in the owner of the fee in whose right it is claimed, even though by one claiming a particular estate, because the nature and commencement of the interest of the latter clearly negative any immemorial occupancy. Hence he must prescribe, if at all, under cover of the tenant in fee;²⁴ for when a man prescribes in a *que estate*, that is, in himself and those whose estate he holds, nothing is claimable but such things as are incident, appendant, or appurtenant to the lands.

2204. We have stated that a negative title by prescription arises from the operation of the *statutes of limitations*. This title arises from the possession of real estate for a certain period, after which the statutes of limitations deprive an adverse claimant of all remedies for the recovery of his supposed rights. It will be perceived that the title claimed by prescription is not founded on the same principle as that which arises from the statute of limitations. In the first case the possessor claims by virtue of a right; in the second, because the plaintiff has no remedy. But though different in principle, still the result is the same, because a right which cannot be enforced must, in law, be considered as having no existence.

The reader ought to bear in mind the distinction which exists between a positive prescription and that which consists in taking away the remedy by statute, because this may have a very important consideration in deciding on

²⁰ 2 Sharswood, Blackst. Comm. 264, 265.

²¹ Sargent v. Ballard, 9 Pick. Mass. 251.

²² Frederick v. Gray, 10 Watts & S. Penn. 182. See Cullen v. Motzer, 13 Serg. & R. Penn. 356; Lodge v. Patterson, 3 Watts, Penn. 77; Watson v. Gregg, 10 id. 296; Gregg v. Blackmore, 10 id. 192.

²³ Wilson v. Stoner, 9 Serg. & R. Penn. 89.

²⁴ 2 Sharswood, Blackst. Comm. 264, 265.

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the constitutionality of the laws. In general, statutes of limitations are prospective only; their object is to establish that a certain lapse of time shall amount to evidence of transfer of property. A statute which would take away a man's remedy, so as wholly to deprive him of his right, would be considered a violation of the constitution, which guarantees to all the right of property.²⁵

The presumptive rights which have been mentioned in the preceding sections, which are evidence of a positive prescription, are said to apply to those cases which are not within the acts of limitations.²⁶

2205. The principal statutes which regulate this subject are the 32 Henry VIII, c. 2, and 21 Jas. I, c. 16, the principles of which have been re-enacted or adopted in most of the states of the Union,²⁷ and are the law there.

The statute of 32 H. VIII enacts that no writ of right shall be brought, or claim or prescription made, for any lands, etc., or other hereditaments, upon seisin of any ancestor or predecessor, unless such seisin was within sixty years before the teste of the writ, or upon one's own seisin within thirty years.

The statute of James provides that writs of formedon, in descender, etc., shall be brought within twenty years next after the title and cause of action first had descended or fallen, saving, however, to infants, femmes coverts, persons non compos, imprisoned,²⁸ or beyond sea, or to their heirs, the right of suing within ten years from removal of such disability, or from their deaths under such disability.²⁹

2206. Allied to prescription is the right acquired by *custom*. The principles which govern the subject are, in general, the same as those which regulate prescriptions. It must be remembered, however, that title by custom must be confined entirely to incorporeal hereditaments.

The distinction between prescription and custom seems to be this, that custom, by which must be understood a particular custom, is a local usage not annexed to the person; as, for instance, for all the tenants of a manor to have a common of pasture; while prescription is always annexed to a particular person. An easement is said to be a service which one neighbor has of another, and may be claimed, and the right to it be established, by prescription; but a multitude of persons cannot prescribe for an easement, though they may plead a custom.³⁰

A custom, we have seen,³¹ is a usage which has acquired the force of law; these customs are general or particular.

To make it a good custom the right must have been exercised for a time beyond legal memory, which goes back to the reign of the English Richard I. But, now, if the existence of a custom at a distant time be shown, and there is no proof of its non-existence at any time, a jury may infer it went back to the time of legal memory.³²

When a right can be claimed by prescription, it cannot, in general, be acquired by custom; a custom to take the profit *in alieno solo*, therefore, is bad; the proper mode of acquiring the right is by prescription.³³

²⁵ *Gospel Society v. Wheeler*, 2 Gall. C. C. 105.

²⁶ 1 Vt. 53.

²⁷ The statute 32 H. VIII, c. 2, s. 2, has not been adopted in Maryland. *Pancoast v. Addison*, 1 Harr. & J. Md. 356. In Louisiana, another system has been adopted.

²⁸ In Tennessee, it has been held that slavery is an imprisonment within the meaning of the statute. *Matilda v. Crenshaw*, 4 Yerg. Tenn. 299.

²⁹ See Coke, Litt. 114, b.

³⁰ 2 Johns. N. Y. 362.

³¹ Before, 121. Bacon, Abr. *Customs*, A.

³² *Lenckhart v. Cooper*, 7 Carr. & P. 119; *Jenkins v. Harvey*, 1 Crompt. M. & R. Exch. 877; 2 *id.* 393.

³³ *Grimstead v. Marlowe*, 4 Term, 717; *Waters v. Lilley*, 4 Pick. Mass. 125; *Perley v. Langley*, 7 N. H. 283; see *Ackerman v. Shelp*, 3 Halst. N. J. 125; *Luffkin v. Haskell*, 3 Pick. Mass. 356.

THIRD BOOK.

OF WRONGS.

CHAPTER I.

WRONGS TO THE PERSON.

- 2207. Wrongs and injuries.
- 2211. Injuries to the absolute rights.
- 2212. Injuries to life, limb and body.
- 2213-2233. Assaults and batteries.
- 2213. Nature of an assault.
- 2214. Nature of a battery.
- 2219-2233. How justified.
- 2220. For the public good.
- 2227. In the exercise of an office.
- 2231. In aid of an authority in law.
- 2232. In self-defence.
- 2234. Menaces and threats.
- 2235. Injuries to health.

2207. Having considered the rights and duties of persons, the nature of personal and real estate, and the manner of acquiring and losing title to all kinds of property, we are, in the next place, to inquire into the wrongs and injuries which men are liable to suffer from others in their persons and property.

2208. A *wrong* is a violation of a right. In its most usual sense it signifies an injury committed to the person, to his relative rights, or to his property, unconnected with contract; but in a more extended signification, wrong includes the violation of a contract; a failure by a man to perform his promise is a wrong to him to whom it was made.¹

Wrongs are divided into public and private. A public wrong is an act which is injurious to the public generally, commonly known by the name of crime, misdemeanor, or offence. Private wrongs are injurious to individuals unaffected by the public.

The same act may constitute a public wrong and a private wrong. Under the English law, when the crime was so grave as to constitute a felony the goods of the felon were forfeited to the crown, and the party injured by the act, toward whom the act constituted a private wrong, could have no remedy. The private wrong was said to be merged in the felony. But this doctrine has not generally been adopted in this country; and in some states where the courts have held the rule to be in force,² it has been abrogated by statute. The character of the act as a crime in no way alters its character as a private injury, and does not de-

¹ 2 Sharswood, Blackst. Comm. 158.

² *Pettingill v. Rideout*, 6 N. H. 454; *Foster v. Commonwealth*, 8 Watts & S. Penn. 77; *Patton v. Freeman*, Cox, N. J. 113; *Allison v. Farmers' Bank*, 6 Rand. Va. 223; *White v. Fort*, 3 Hawks, No. C. 251; *Robinson v. Culp*, 1 Const. So. C. 231; *Story v. Hammond*, 4 Ohio, 376; *Ballew v. Alexander*, 6 Humphr. Tenn. 433.

prive the party injured of his remedy.³ An exception still exists in the case of felonious killing, for which no civil remedy exists.⁴

2209. *Tort*, a term of a signification somewhat similar to wrong, is an unlawful act injurious to another, independent of any contract. Torts may be committed with force, as trespasses, which may be an injury to the person, such as assault, battery, and imprisonment; or they may be committed without force; torts of this last kind are to the absolute or relative rights of persons, or to personal property in possession or reversion, or to real property, corporeal or incorporeal, in possession or reversion; these injuries may be either by non-feasance, malfeasance, or misfeasance.

In the consideration of wrongs we will confine ourselves to those of a private nature. These naturally divide themselves into such as affect the person, such as relate to personal property, and such as are injurious to real estate.

2210. The injuries to persons affect either their absolute or relative rights.

2211. The absolute rights of persons are vested, by the constitution and laws, in every freeman born in this country, or who is a citizen of the United States, or who is a resident here, except he be an alien enemy, and the laws protect him in his personal security of life, limb, body, health, reputation, and liberty.

2212. The injuries to life, limb, and body, considered as private wrongs are assaults and batteries, menaces, and threats, and injuries arising from want of due care, and the like.

2213. An *assault* is an unlawful attempt or offer, with force and violence, to do a corporeal hurt to another, whether from malice or wantonness; for example, by striking at him, or even holding up the fist at him in a threatening and insulting manner, or with circumstances as denote at the time an intention, coupled with a present ability,⁵ of actual violence against his person; as, pointing a weapon at him when he is within reach of it. Thus, levelling a gun at another within a distance from which, supposing it to be loaded, the contents might wound, is an assault;⁶ or riding after a person and obliging him to run into a garden to avoid being beaten is also an assault.⁷ Unless there has been an offer to strike with an intention manifested at the time of committing an injury there will be no assault.

Abusive words, however violent, cannot alone constitute an assault; they may, indeed, on the contrary, sometimes so explain the aggressor's intent, as to prevent an act *prima facie* an assault from amounting to such an injury; as, when a man, during the sitting of the court of assizes, in a threatening posture, half drew his sword from its scabbard and said, "If it were not assize time, I would run you through the body," it was adjudged that the act did not amount to an assault, for in that the intention to injure is an essential ingredient, and here it was wanting.⁸

³ Boston R. R. v. Dana, 1 Gray, Mass. 83; Phillips v. Kelley, 29 Ala. N. S. 628; Wheatley v. Thorn, 23 Miss. 62.

⁴ Carey v. Berkshire R. R., 1 Cush. Mass. 475. The cases have gone so far as to hold that no action lies for the death of a person whether the killing be felonious or from carelessness. There may be a statutory penalty for the carelessness. The right of action against railroads and others, independent of statutes, belongs to the person killed, on account of the injury, pain, and suffering, and not on account of the death. If the death is instantaneous therefore, there is no instant of time when the person killed had a right of action, and therefore none survives to his representatives. Baker v. Bolton, 1 Campb. 493.

⁵ Read v. Coker, 13 C. B. 850.

⁶ Comyn, Dig. *Battery*, C; State v. Shepard, 10 Iowa, 126; State v. Smith, 2 Humphr. Tenn. 457; Beach v. Hancock, 26 N. H. 223.

⁷ Morton v. Shoppee, 3 Carr. & P. 373.

⁸ Redman v. Edalfe, 1 Mod. 3; Viner, Abr. *Trespass*, A, 2; Hawkins, P. C. c. 2, s. 1; Handy v. Johnson, 5 Md. 450; Richels v. State, 1 Sneed, Tenn. 606; State v. Crow, 1 Ired. No. C. 376; Woodruff v. Woodruff, 22 Ga. 237.

Assaults are of two kinds, either simple or aggravated.

A *simple assault* is one where there is no intention to do another distinct injury.

An *aggravated assault* is one that, in addition to the base intention to commit it, has another object which is also criminal; for example, if a man should fire a pistol at another and miss him, the former would be guilty of an assault with intent to murder; so an assault with intent to rob a man, or with intent to spoil his clothes, and the like, are aggravated assaults, and they are more severely punished than simple assaults.

2214. A *battery* is the unlawful touching the person of another, either by the aggressor himself, or by any substance put in motion by him.⁹

The unlawfulness of the act may arise from a desire to do an injury to the person beaten, from anger or revenge, or from mere rudeness and insolence.

A man may commit a battery for the purpose of committing an injury on another, and from whatever motive he has been actuated, the offence is complete; the law cannot dive into the mind of the aggressor to ascertain his motive; if the injury is committed, malice will be inferred, unless the aggressor can excuse or justify his conduct.

The motive may be anger or revenge. When this is apparent, the least touch of the person of another will be considered an assault and battery, and the tortfeasor will be guilty of a trespass.

Rudeness alone may be the motive, and render the trespasser guilty of a battery, although the injury may be very slight indeed, provided the person injured has been touched. This term of rudeness is relative, and it is difficult to define it. Acts which one friend might do to another could not be justified by persons altogether unacquainted; persons moving in polished society could not be permitted to do to each other what boatmen, hostlers, and such persons might perhaps justify,¹⁰ because it might be fairly presumed in the case of the latter that an implied license had been given to commit such acts. An act which, if done by one gentleman toward a lady, might be considered as a battery, if done by one gentleman toward another would not be viewed in that light.¹¹

An injury, therefore, be it ever so small, done to the person of another in an angry, revengeful, rude, or insolent manner, as by spitting in his face, violently jostling him, or knocking off his hat, is a battery.¹²

2215. But to make the battery unlawful it must be wilfully committed or proceed from want of due care, for otherwise it is *damnum absque injuria*, and the party aggrieved is without a remedy; as, if a horse run away, without any fault of the rider, go over another person and does him an injury, no action lies, because the injury is considered as proceeding, not from the man, but from the horse. But this is the case only where the rider is wholly without fault; for if he were riding furiously, or were otherwise in fault, he would be responsible. To excuse a trespass the accident must be unintentional, unavoidable, and without the least fault of the trespasser.¹³

In criminal cases it is a maxim that the act itself does not make a man guilty unless it be done with a criminal intent, *actus non facit reum, nisi mens sit rea*, but in civil matters it is otherwise; therefore, in an action of trespass for an assault and battery, where the defendant pleaded that the plaintiff and himself were soldiers at exercise, skirmishing with their muskets, and that in so doing

⁹ 3 Sharswood, Blackst. Comm. 120.

¹⁰ See 2 Hagg. Eccl. 73.

¹¹ Rex v. Nichol, Russ. & R. 180.

¹² 1 Hawkins, P. C. 263. But it is said that taking it off a person is no battery, 1 Saund. 14.

¹³ Jennings v. Fundeburg, 4 M'Cord, So. C. 161.

the defendant, *casualiter et per infortunium et contra voluntatem suam*, in discharging his piece wounded the plaintiff; on demurrer the plea was held bad, for, say the court, a man shall not be excused a trespass except it has been committed utterly without his fault. The distinction is plainly marked between a case where the defendant has been in fault and where he has not; for, supposing in this case, instead of pleading the above plea, the defendant had pleaded that the plaintiff ran across his piece when he was in the act of discharging it, it would have appeared to the court that it was inevitable, and that the defendant had been guilty of no negligence.¹⁴

2216. A battery may produce various effects, which will now be explained:

A bruise or a contusion is an injury done with violence to the person without breaking the skin.

A wound is an injury to a person by which the skin is broken.¹⁵

A mayhem is the act of unlawfully and violently depriving another of the use of such of his members as may render him less able in fighting either to defend himself or annoy his adversary; and, therefore, the cutting, or disabling, or weakening a man's hand or finger, or striking out his eye or foretooth, or depriving him of those parts the loss of which abates his courage, is held to be a mayhem. But cutting off the nose or ear, or the like, are not held to be mayhems at common law, though they are grievous trespasses for which damages will be recovered.

2217. In all these cases the party attacked may defend himself, but he must not use this right beyond the just bounds of self-defence; and for the redress of these wrongs the law gives him an action of trespass.

2218. There are also injuries to the person, body, or limbs, which are occasioned by negligence or misfeasance; as, where the damage is sustained from leaving open trap doors or areas in public streets, or suffering a dangerous dog or other animal to go at large,¹⁶ or any injury arising from a similar cause. The remedy for such an injury is an action on the case.

2219. A battery may be *justified* for the public good, in the exercise of an office, in aid of an authority in law, or as a matter of defence.

2220. For the wise purpose of enforcing obedience of inferiors to superiors the law has invested the latter in many cases with the power of correction, which is the chastisement by one having authority of a person under his lawful power who has committed some offence for the purpose of bringing him to legal subjection.

It is chiefly exercised in a parental manner by parents, or those who stand in *loco parentis*. A parent may therefore justify the correction of the child, either corporally or by confinement; and a schoolmaster, under whose care and instruction a parent has placed his child, may equally justify similar correction; but the correction in both cases must be moderate and in a proper manner, and for the good of the child. But if the parent or master have not acted in great violation of justice and propriety, their conduct will not be weighed in golden scales.¹⁷

For the same reason a master, who stands in *loco parentis*, may himself correct his apprentice for disobedience, but he cannot delegate his authority to another. A master has no right to correct his hired servants who are not his apprentices.

Soldiers are bound to obey their superiors in all their lawful commands, and

¹⁴ *Weaver v. Ward*, Hob. 134.

¹⁵ *Moriarty v. Brooks*, 6 Carr. & P. 684. Vide Beck, Med. Jur. Ch. 15; *Roscoe, Cr. Ev.* 652.

¹⁶ *Dilts v. Kinney*, 3 Green, N. J. 130.

¹⁷ *Comyn, Dig. Pleader*, 3 M. 19; *Hawkins, P. C.* c. 60, § 23, c. 62, § 2, c. 29, § 5.

are justified in all their acts for such obedience; on the other hand, they are liable to punishment for disobedience, and therefore a superior may inflict correction on them, and unless the punishment has been unlawful, he will be justified.

In order to maintain discipline in the national navy, as well as in the vessels of individuals, the law invests the captains of vessels with authority to reduce sailors to obedience.¹⁸

Any excess of correction by the parent, master, officer, or captain, may render the party guilty of an assault and battery, and liable to all the consequences of such an unlawful act.¹⁹

2221. An assault and battery may be justified when committed to preserve the peace; and, therefore, if the plaintiff assaults or is fighting with another, the defendant may lay hands upon him and restrain him until his anger is cooled, but he cannot strike him in order to protect the party assailed, as he may in self-defence.²⁰

2222. Watchmen may arrest and detain in prison for examination persons walking in the streets by night whom there is a reasonable ground to suspect of a felony, although there is no proof of a felony having been committed.²¹

2223. Any person has a right to arrest another to prevent a felony; for example, to prevent him from murdering his wife.

2224. Any person may arrest one who has actually committed a felony.

2225. The distinction between peace officers and private persons, in regard to the right to arrest without warrant for felony, is this: a peace officer is justified if he has reasonable grounds for suspicion, whether the person arrested is guilty or not; a private person arrests at his peril, and is justified only in case the person arrested is actually guilty.

2226. It is lawful for any man to lay hands on another to preserve public decorum; as, to turn a person out of church, or to prevent him from disturbing a religious congregation or a funeral ceremony.²² But a request to desist should first be made, unless the urgent necessity of the case dispenses with it.

2227. *Watchmen*, we have seen, may arrest suspicious persons at night, and they will be justified.

2228. A constable is authorized by law to arrest any one who, in his view, has committed a breach of the peace, and take him before a magistrate; but if an offence has been committed out of the constable's sight, he cannot arrest without a warrant, unless the offence amounts to a felony, or a felony is likely to ensue.

2229. A ministerial officer, whose duty it is to execute the process of a court, or tribunal of competent jurisdiction, will be justified in its execution, whether the process be regular or irregular;²³ but if the court have no jurisdiction, he will be a trespasser; and when the process is wholly illegal or misapplied, as to the person intended to be arrested, without regard to any question of fact, or whether innocent or guilty, or the existence of any debt, then the party imprisoned may legally resist the arrest and imprisonment, and may escape, or be

¹⁸ Abbott, Shipp. 160; 1 Chitty, Pr. 73; Turner's Case, 1 Ware, Dist. Ct. 83; 1 Pet. Adm. 168. By Act of Congress of Sept. 28, 1850, flogging in the navy and on board vessels of commerce has been abolished. 9 Stat. 515.

¹⁹ Hannen v. Edes, 15 Mass. 347.

²⁰ 2 Rolle, Abr. 359 (E), pl. 3. The right of third persons, private persons, in such cases extends only to directing a peace officer to take the party committing the breach into custody. Such third person is guilty of a battery if he lay hands on him himself. Phillips v. Trull, 11 Johns. N. Y. 486.

²¹ Lawrence v. Hedger, 3 Taunt. 14; see Rex v. Bootie, 1 Burr. 164.

²² Clever v. Hynde, 1 Mod. 168; see Hall v. Planner, 2 Kebl. 124.

²³ Codrington v. Lloyd, 8 Ad. & E. 449.

rescued, or break prison, because he is not, in point of law, subject to any arrest;²⁴ as, where process was issued against an ambassador to cause him to be arrested, the writ and proceedings are void for want of jurisdiction in the court, or by reason of the privilege of the defendant, which privilege he cannot waive.²⁵

2230. A justice of the peace may in general justify all acts for which a constable would be justified, when acting without a warrant.

2231. Every person is empowered to restrain breaches of the peace by virtue of the authority vested in him by law.

2232. It may be justified by a man in defence of himself, his wife, his child, or servant; so likewise the wife may justify a battery in defence of her husband; the child of its parent; the servant of his master.²⁶

In these cases, the party need not wait until a blow has been given, for then he might be too late, and disabled from warding off a second, or effectually protecting the person assailed. Care, however, must be taken that the battery transgress not the bounds of necessary defence and protection, for it is only permitted as a means of averting an impending evil, which might otherwise overwhelm the party, and not a punishment or retaliation for the injurious attempt.²⁷ The degree of force necessary to repel an assault will naturally depend upon, and be proportioned to, the violence of the assailant; but with this limitation any degree is justifiable.

2233. A battery may also be justified in the necessary defence of one's property. Some rules, however, must be observed, in order not to violate the law. If the plaintiff is in the act of entering peaceably into the defendant's land, or having entered, he is doing no violence, he must be requested to depart before any attempt is made to eject him; if he refuses, then, and not till then, the defendant may lay hands gently upon the plaintiff to remove him from the close, and for this purpose he may use, if necessary, any violence short of striking the plaintiff. If the plaintiff resists the defendant, the latter may oppose force to force.²⁸

But if the plaintiff is in the act of entering upon the land for an unlawful purpose, or having entered is discovered in the act of unlawfully subverting the soil, cutting down a tree, and the like, a previous request is unnecessary, and the defendant may instantly lay hands upon the plaintiff, for the time employed in requesting him to desist would add to the destruction of the property.²⁹

A man may also justify a battery in defence of his personal property, without a previous request, if another attempt to take away such property out of his possession;³⁰ and in case of a felonious attempt to deprive him of his property, he may use any force to prevent it.³¹

2234. A menace or threat is a malicious declaration of an intention to do an injury unlawfully to another; such as sending a threatening letter to another, and informing him that unless he does certain things the writer will commit an injury to his person, his relative rights, or his property. This is a misdemeanor,

²⁴ 1 Chitty, Pr. 637.

²⁵ United States v. Benner, 1 Baldw. C. C. 235, 240; see Nichols v. Thomas, 4 Mass. 232; Pearce v. Atwood, 13 id. 324.

²⁶ Orton v. State, 4 Greene, Iowa, 140.

²⁷ Brown v. Gordon, 1 Gray, Mass. 182; O'Leary v. Rowan, 31 Mo. 117; Rogers v. Waite, 44 Me. 275; Doll v. Erskine, 35 N. H. 503; Philbrick v. Foster, 4 Ind. 442.

²⁸ Weaver v. Bush, 8 Term, 78; Commonwealth v. Clark, 2 Metc. Mass. 23.

²⁹ Weaver v. Bush, 8 Term, 78.

³⁰ Green v. Goddard, 2 Salk. 641.

³¹ Abusive and insulting language is not a justification of an assault, although it may be proved in mitigation of damages, if it immediately precedes the assault so as to furnish a natural provocation. Ireland v. Elliott, 5 Iowa, 478; Gaither v. Blowers, 11 Md. 536.

for which the party aggrieved may cause the wrong doer to give security to keep the peace.³² If the person menaced should sustain any pecuniary loss by such threat, or suffer any special damages, he may have an action on the case against the wrong doer.³³

2235. *Private injuries affecting a man's health* arise upon a breach of contract, either express or implied, or in consequence of some tortious act unconnected with a contract.

2236. Those injuries to health which arise upon a contract are,

The misconduct of medical men, when, through neglect, ignorance, or wanton experiments, they injure their patients. There are three kinds of mal-practice for which an action will lie, and sometimes an indictment can also be sustained; these are,

Wilful mal-practice, which takes place when the physician wilfully administers medicines, or performs an operation unlawfully, which he knows and expects will result in danger or death to the individual under his care: as, in the case of a criminal abortion.

Negligent mal-practice, which comprehends those cases where there is no criminal or dishonest object, but gross negligence of that attention which the patient requires; as, if a physician should administer injurious medicines while in a state of intoxication.

Ignorant mal-practice, which is the administration of medicines, calculated to do injury, which do harm, and which well-educated and scientific medical men would know were not proper in the case.³⁴

The sale of unwholesome food. Though the law does not in general consider a sale a warranty of goodness of a personal chattel, it is otherwise with regard to food or liquors³⁵ when sold for consumption.

2237. Those injuries which affect a man's health, and which arise from tortious acts unconnected with contracts, are,

First. Public and private *nuisances*. A nuisance is any thing which unlawfully and tortiously does hurt, or causes inconvenience or damage. Nuisances are either public or private.

A public or common nuisance is such an inconvenience or troublesome offence as annoys the whole community in general, and not merely some particular person.³⁶ To constitute a public nuisance there must be such a number of persons annoyed that the offence can no longer be considered a private nuisance; this is a fact which generally is to be found by the jury.

It is difficult to define what degree of annoyance is necessary to constitute a nuisance. In relation to offensive trades, it seems that when such trade renders the enjoyment of life and property uncomfortable it is a nuisance, for the people of the neighborhood have a right to pure and fresh air.³⁷

³² Hawkins, P. C. B. 1, c. 53, s. 1; 2 Russell, Cr. 575; 2 Chit'y, Cr. Law, 841; 4 Sharswood, Blackst. Comm. 126.

³³ See Comyn, Dig. *Battery*, D; Viner, Abr.; Bacon, Abr. *Assault*.

³⁴ *Grannis v. Branden*, 5 Day, Conn. 260; 9 Conn. 209; 1 Saund. 312, n. 2. A physician is liable for the exercise of ordinary care and skill, not the highest kind of skill. *Wood v. Clapp*, 4 Sneed, Tenn. 65; *Leighton v. Sargent*, 27 N. H. 460; *McCandless v. McWha*, 22 Penn. St. 261; *Simonds v. Henry*, 39 Me. 155; *West v. Martin*, 31 Mo. 376.

³⁵ 1 Rolle, Abr. 90, pl. 1, 2.

³⁶ 1 Hawkins, P. C. 197; 4 Sharswood, Blackst. Comm. 166, 167.

³⁷ A distillery where hogs are fed on the offal, rendering the waters of a creek unwholesome, and the vapors making a dwelling-house uninhabitable, is a nuisance. *Smith v. McConathy*, 11 Mo. 517; a livery stable in a city. *Coker v. Birge*, 10 Ga. 336; a powder magazine, *Cheatham v. Shearon*, 1 Swan, Tenn. 213; a tenement-house filthy and calculated to breed disease, *Meeker v. Van Rensselaer*, 15 Wend. N. Y. 397; a furious dog at large is a common nuisance, and may be killed by any one, *Brown v. Carpenter*, 26 Vt. 638; *Maxwell v. Palmerton*, 21 Wend. N. Y. 407.

A thing may be a public nuisance in one place which is not so in another; therefore the situation or locality of the nuisance must be considered. A tallow chandler setting up his business among other tallow chandlers, and thereby increasing the noxious smell of the neighborhood, is not guilty of setting up a nuisance, unless the annoyance is much increased by the new manufactory.³⁸ Such an establishment might be a nuisance in a thickly populated town of merchants and mechanics, where no such business was carried on.

A private nuisance is any thing unlawfully and tortiously done to the hurt or annoyance of the person, or of the lands, tenements, or hereditaments of another.³⁹

Where the injured party has sustained special damages, he may maintain an action for the loss he has sustained either by a public or private nuisance.

Second. On principle, it would seem that if a person's health be injured by a sudden frightening, as by a person wilfully assuming the appearance of a ghost, or doing any other act on purpose to terrify others, whose nerves are thereby injured, an action would lie for the consequences.⁴⁰

³⁸ *Rex v. Neville, Peake* 91.

³⁹ 3 *Sharswood, Blackst. Comm.* 215; *Finch, Law.* 188.

⁴⁰ 1 *Chitty, Pract.* 43.

CHAPTER II.

LIBEL AND SLANDER.

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 - 2263. The remedy for slander.

2238. The law protects every man in his social intercourse, in his property, in his marriage, and, lastly, in any office he may hold; and the diminution of any of these rights by any false representation, either verbal or written, of the party who enjoys them is an injury to him.

In selecting those among his fellow creatures in whom either to repose his interest or his affections, every one will naturally discard all whom he suspects or believes to be unworthy of trust. The acquaintance which each man has with the characters of other men can be but limited, and, most usually, he derives his information in this particular from others. Should their report of any individual, however unfounded in truth, be unfavorable, though it may not operate conviction on his mind, it will engender distrust; for it can hardly be imagined that it is wholly a malicious falsehood. Men are not inclined to take the trouble to ascertain the truth or falsehood of statements made in relation to others, but when a man is so disposed, he has not, perhaps, an opportunity of examining the matter, nor is he able to disprove the charge to his own satisfaction, and trace its falsehood through all the varieties of knavery that produced it; so that should the party accused be in possession of his confidence or esteem, or become at any future time a candidate for either, he will naturally reject his claim in the one case and renounce him in the other. Hence it is that a charge or accusation which imports that a man is unfit for society, for his profession or his trade, for the marriage state, or for his situation of public trust, is likely to raise a suspicion or belief that he is really incapacitated, and thereby to cut off or diminish his means of attaining to, or, if already in possession, is likely to

deprive him of, the enjoyment of either, and is therefore injurious. When the statement is false it is denominated slander, and renders its author liable to an action.

2239. *Injuries to reputation* consist in written or oral slander, and malicious prosecution, imputing the guilt of some crime. Written slander comes within the definition of a libel; oral slander, which is commonly called slander simply, is very different from that which is written, as will be presently seen.

2240. A *libel* is a defamation expressed either in printing or writing, or by signs or pictures, tending to blacken the memory of one who is dead, with intent to provoke the living; or the reputation of one who is alive, and expose him to public hatred, contempt, or ridicule.¹ It has been defined, perhaps with more precision, to be a false, censorious, or ridiculous writing, picture, or sign, made with a malicious or mischievous intent toward government, magistrates, or individuals.²

In considering this subject, it will be proper to inquire into the mode of conveying the libel, the kind of defamation it must consist of, how it must be expressed, the mode of publication, its justification, and the remedy.

2241. The libellous matter is usually reduced to writing or printing; but it must be remembered that a libel may be conveyed by signs or pictures. The exhibition of a picture, therefore, intimating that which in print would be libellous, is equally criminal. Fixing a gallows at a man's door, burning him in effigy, or exhibiting him in any ignominious manner, is a libel.³

2242. A libel against a private individual may either charge the party injured with a criminal offence, or with something for which he could be indicted, if true; or it may exhibit him in a ludicrous point of view, and point him out as an object of ridicule and disgust.⁴ In short, the statement of any thing which is injurious to his business, or which is calculated to drive him out of society, as, to say that one has a loathsome disease,⁵ is a libel. But saying that a man had such a disease is not libellous, because, being cured, he is not to be kept out of society on that account.

Libels against the memory of the dead, which have a tendency to a breach of the peace by inciting the friends and relatives of the deceased to avenge the insult to the family, render their authors liable to animadversion.⁶

But allegations, however false and malicious, contained in answer to interrogatories, in affidavits duly made,⁷ or any other proceedings in courts of justice, or petitions to the legislature and communications to a governor respecting an officer, although they are of a libellous character, are excusable if they do not originate in malice or without probable cause.⁸

Many acts which would be libellous may be justified on account of the occasion upon which they took place.

2243. If the matter is understood as libellous, and is calculated to excite

¹ Hawkins, P. C. b. 1, c. 73, s. 1; Wood, Inst. 444; 4 Sharswood, Blackst. Comm. 150. Many words are libellous when written which would not be scandalous when spoken. Thus words which make a man infamous, odious, or ridiculous, are *primâ facie* libellous, without proof of special damage. *White v. Nicholls*, 3 How. 266.

² *People v. Crosswell*, 3 Johns. Cas. N. Y. 354; *Steel v. Southwick*, 9 Johns. N. Y. 214; *State v. Farley*, 4 M'Cord, So. C. 317.

³ Hawkins, P. C. b. 1, c. 73, s. 2.

⁴ *Shattuck v. Allen*, 4 Gray, Mass. 540; *Hillhouse v. Dunning*, 6 Conn. 391; *Lansing v. Carpenter*, 9 Wisc. 540.

⁵ *Villars v. Monsley*, 2 Wils. 203.

⁶ 5 Coke, 123; *Commonwealth v. Taylor*, 5 Binn. Penn. 281.

⁷ 1 Saund. 132, note (1); *Hodson v. Scarlett*, 1 Barnew. & Ald. 232.

⁸ *Gray v. Pentland*, 2 Serg. & R. Penn. 23; 4 *id.* 420; *Thorne v. Blanchard*, 5 Johns. N. Y. 508.

ridicule or abhorrence against the party injured, it is libellous, however it may be expressed.⁹ It is not unusual with artful libellers to use the figure of irony in order to convey their poisoned shafts. This is a refined species of ridicule, which, under the mask of honest simplicity or ignorance, exposes the faults of others by seeming to adopt them; as, if the writer praise a soldier's prudence in not going into battle because the public could not spare so brave a man.¹⁰ Again, a publication in the form of an interrogatory is considered as libellous as if an assertion were made in answer to such interrogatory.¹¹

2244. The publication of a libel is usually made by writing and exposing the writing to the view of others, or by printing in books, pamphlets, or newspapers; and in that case the sale of each copy, when several copies have been sold, is a distinct publication and a fresh offence. But there are other modes of publication. The malicious reading of a libel to one or more persons; it being on the shelves in a bookstore, as other books, for sale; and where the defendant caused the libel to be printed, took away some of the copies, and left others; these several acts were held to be sufficient publications.

2245. The publication must be *malicious*, but express malice need not be proved. Such malice may be implied; for where a man publishes a writing which on the face of it is libellous, the law presumes he does so from that malicious intention which constitutes the offence, and it is unnecessary on the part of the prosecution to prove any circumstance from which malice may be inferred.¹² But malice does not imply ill-will toward the person libeled.¹³

2246. A *justification* is an act by which a party charged shows and maintains a good and legal reason in court why he did the thing he is called upon to answer.

2247. In civil actions a man may justify a libel or slanderous words by proving their truth, or that the defendant had a right, upon the particular occasion, either to write and publish the writing or to utter the words; as, when libellous words are found in a report of a committee of congress, or in an indictment, or a declaration; or words of a slanderous nature are uttered in the course of debate in the legislature by a member, or at the bar by counsel, when properly instructed by the client on the subject.

2248. In general, the justification must be specially pleaded, and it cannot be given in evidence under the plea of the general issue.¹⁴

If the libel is false in fact, it is no justification that the publisher believes it to be true,¹⁵ although such belief may be admissible where it is essential to prove actual malice.

2249. Some communications, whether written or spoken, are absolutely privileged. Such are speeches or other official communications made by members of the national or state legislatures. It makes no difference how malicious in fact may be the motive. But this does not protect a member or other person

⁹ Woolnoth v. Meadows, 5 East, 463; Robinson v. Jermyn, 1 Price, Exch. 11, 17; Schenck v. Schenck, 1 Spenc. N. J. 208.

¹⁰ Hob. 215; Bacon, Abr. *Libel*, A. 3; 3 Chitty, Cr. Law, 869; Hawkins, P. C. b. 1, c. 73, s. 4. See Southwick v. Stevens, 10 Johns. N. Y. 443.

¹¹ Hotchkiss v. Oliphant, 2 Hill, N. Y. 510; Goodrich v. Davis, 11 Metc. Mass. 473.

¹² White v. Nicholls, 3 How. 266. As a matter of law, all injurious statements of a libellous character are presumed to be malicious unless they are made in the discharge of a public or private duty, or in the conduct of one's own business. In these cases actual malice must be proved; in its absence, they are privileged communications, not actionable. Swan v. Tappan, 5 Cush. Mass. 104.

¹³ Commonwealth v. Bonner, 9 Metc. Mass. 410.

¹⁴ Updegrove v. Zimmerman, 13 Penn. St. 619; Taylor v. Robinson, 29 Me. 323; Teagle v. Deboy, 8 Blackf. Ind. 134; Sheahan v. Collins, 20 Ill. 325.

¹⁵ Holt v. Parsons, 23 Tex. 9; Moore v. Stevenson, 27 Conn. 14; Smart v. Blanchard, 42 N. H. 137; Gilmer v. Ewbank, 13 Ill. 271.

who prints his speeches for public circulation. No action lies against a judge for what he says or writes in his judicial capacity.¹⁶

2250. There is no preventive remedy for a libel before it is published; a continued publication may, however, be prevented by destroying it,¹⁷ but not by a cross libel against the wrong doer.¹⁸ A compensation for the damages sustained may be recovered by an action, and the author may be punished by indictment. When the libel is contained in an affidavit or other legal proceedings, the party libelled may apply to the court to have the scandalous matter struck out; but, as has been before observed, no action can be maintained for such a libel.

2251. *Slander*, as distinguished from a libel, is the malicious publication of words by speaking, by reason of which the person to whom they relate becomes liable to suffer corporal punishment, or to sustain some damage. This subject will be treated of with reference to the nature of the accusation; the falsity of the charge; the mode of publication; the occasion; the malice or motive; and the remedy.

2252. *Actionable words* are of two descriptions: first, those actionable in themselves, without proof of special damages; and, secondly, those actionable only in consequence of some actual damage caused thereby.

2253. *Words actionable in themselves* may be classified as follows:

First. Those which impute the guilt of some crime for which the party, if guilty, might be indicted and punished by the criminal courts; as, to call a person a traitor, thief, highwayman, or to say that he has been guilty of perjury, forgery, murder, or the like. And although the imputation of guilt be general, without stating the particulars of the pretended crime, it is actionable.¹⁹

Second. A false statement that the party has a disease or distemper which renders him unfit for society is slanderous;²⁰ an action can therefore be sustained for calling a man a leper.²¹ But as the reason why an action can be sustained for such a charge is that it will exclude him from society, it follows that if the charge has no such effect it will not be slanderous; as, where the charge was that the plaintiff had formerly had a contagious disease.²²

Third. Words imputing unfitness in an officer who holds an office to which profit or emolument is attached, either in respect of morals or inability to discharge the duties of the office.²³

¹⁶ *South v. Maryland*, 18 How. 403.

¹⁷ See 2 Campb. 511.

¹⁸ *Stuart v. Lovell*, 2 Stark. 84.

¹⁹ *Hoag v. Hatch*, 23 Conn. 590; *Johnson v. Shields*, 1 Dutch. N. J. 118; *Burton v. Burton*, 3 Iowa, 316; *Beck v. Stitzel*, 21 Penn. St. 522; *Dunnell v. Fiske*, 11 Metc. Mass. 552; *Edgerly v. Swaine*, 32 N. H. 481; *Kinney v. Hosea*, 3 Harr. Del. 77. It is said in most of the cases that the words must not only charge an indictable offence, but an offence involving moral turpitude, or punishable by some disgraceful punishment. *Buck v. Hersey*, 31 Me. 558; *Gosling v. Morgan*, 32 Penn. St. 273; *Mills v. Wimp*, 10 B. Monr. Ky. 417. This distinction is similar to the distinction between *mala prohibita* and *mala per se*, and seems illogical. Thus it is held not slanderous to charge one with whipping his wife so as to cause her to miscarry. *Dudley v. Horn*, 21 Ala. N. S. 379; *Birch v. Benton*, 26 Mo. 153. Among the crimes, a charge of which is slanderous, are perjury, *Newbit v. Statuck*, 35 Me. 315; *Williams v. Spears*, 11 Ala. N. S. 138; *Mower v. Watson*, 11 Vt. 536; *Persely v. Bacon*, 20 Mo. 330; larceny, *Gaul v. Fleming*, 10 Ind. 253; *Burbank v. Heard*, 39 Me. 233; forgery, *Atkinson v. Reding*, 5 Blackf. Ind. 39. Charging a woman with want of chastity is actionable, especially where fornication is an indictable offence. *Moberly v. Preston*, 8 Mo. 462; *Worth v. Butler*, 7 Blackf. Ind. 251; *Smith v. Silence*, 4 Iowa, 321; *Sidgreaves v. Myatt*, 22 Ala. N. S. 617; *Kenney v. McLaughlin*, 5 Gray, Mass. 5; *Symonds v. Carter*, 32 N. H. 458.

²⁰ *Bacon*, Abr. *Slander*, B. 2; *Goldman v. Stearns*, 7 Gray, Mass. 181.

²¹ *Croke*, Jac. 144; *Starkie*, Sland. 97. See *Holt*, Lib. 221.

²² *Bacon*, Abr. *Slander*, B. 2; 2 Term, 473.

²³ *Starkie*, Sland. 100; *Holt*, Lib. 207; *Rolle*, Abr. 65; *Johnson v. Stebbins*, 5 Ind. 364.

Fourth. The charge of a want of integrity or capacity, whether mental or pecuniary, in the conduct of a profession, trade, or business, in which the party is engaged, is actionable;²⁴ as, to accuse an attorney or artist of inability, inattention, or the want of integrity, or a clergyman of being a drunkard.²⁵

2254. There is a class of words which are actionable only in consequence of the special damages sustained by the party slandered. Though the law will not, in those cases, permit the inference of damage, yet when the damage has actually been sustained, the party aggrieved may maintain an action for the publication of an untruth,²⁶ unless the statement be made for the assertion of a supposed claim. For example, a charge against the plaintiff of ingratitude toward others, or that he is a rogue, a rascal, a scoundrel, or that he is fore-sworn,²⁷ is not slanderous; but if he can show that he has sustained special damages in consequence of such charge, he can maintain an action for the recovery of a recompense to indemnify him for such a loss.²⁸

2255. The slanderous charge must be *false*, but when the words are slanderous, the falsity of the accusation will be implied till the contrary is shown. The instance of a master making an unfavorable representation of his servant upon an application for his character seems to be an exception; in that case there being a presumption from the occasion of the speaking that the words are true.²⁹

2256. The injury of which the plaintiff complains being a loss of reputation, he must be entitled to a good reputation by his conduct, or he has not suffered any damage from the slanderous words. He is entitled to hold this reputation with the world, upon this condition only, that he has deserved the character it confers; and if the accusation be true, he cannot with any propriety be said to have lost that to which he has no title whatever; and with this reasoning agrees the civil law.³⁰

2257. The charge must not only be false, but it must be *certain* as to the person accused. A charge made against one of a body of men, without designation of any one in particular, is not such slander as the speaker would be called to an account for; as, if one should say, "one of the members of such a corporation is a thief," without designating any member, no one could sustain an action of slander against him.³¹ And for the same reason, a charge made against a class of persons is not such a slander of any one that he can maintain an action for it.³²

With regard to public officers and candidates for office, it is not only the right but the duty of every citizen to make known to their constituents, decently and with a view to their removal or non-election, all facts unfitting them for the discharge of their office. But they are liable if they depart from the truth. *Deeds v. Henry*, 9 Mass. 262; *Seely v. Blair*, Wright, Ch. Ohio, 358; *State v. Burnham*, 9 N. H. 35.

²⁴ 1 Malyne, Entr. 244; *Gay v. Homer*, 13 Pick. Mass. 535; *Davis v. Davis*, 1 Nott & McC. So. C. 290; *Fowles v. Bowen*, 30 N. Y. 24; *Butler v. Howes*, 7 Cal. 87; *Ware v. Clowney*, 24 Ala. N. s. 707; *Camp v. Martin*, 23 Conn. 86. It is actionable to speak of men, whose occupation requires credit, words imputing inability to pay their debts. *Ombony v. Jones*, 19 N. Y. 241; *Prettyman v. Shockley*, 4 Harr. Del. 112; *Beardsley v. Tappan*, 1 Blatchf. C. C. 588.

²⁵ *McMillan v. Birch*, 1 Binn. Penn. 178.

²⁶ Comyn, Dig. *Action upon the Case for Defamation*, D, 30; Bacon, Abr. *Slander*, B.

²⁷ 1 Chitty, Pract. 44.

²⁸ The special damage caused by words, not actionable in themselves, must be the natural and immediate result of the words. Thus the defendant is not liable for whatever third parties do in consequence of the words, unless such acts are the natural consequence. Loss caused by the repetition of the words is not special damage. *Stevens v. Hartley*, 11 Metc. Mass. 542; *Terwilliger v. Wands*, 17 N. Y. 58; *Fowles v. Bowen*, 30 N. Y. 22.

²⁹ *Starkie, Slander*, 441, 175, 223.

³⁰ Dig. 47, 10, 18.

³¹ Bacon, Abr. *Slander*, H; *Ryckman v. Delavan*, 17 Wend. N. Y. 52; 23 Wend. N. Y. 186; *Wiseman v. Wiseman*, Croke, Jac. 107.

³² *Ellis v. Kimball*, 16 Pick. Mass. 132.

But words in themselves uncertain may be explained by evidence; as, where a libel was addressed "to the editor of the Times," evidence was admitted to show that the plaintiff was the editor.³³ So witnesses to whom the words were addressed are allowed to testify in what sense they understood them.³⁴

2258. *The publication of slanders* is to communicate them to some person who is capable of understanding what is said; for if the hearer is unable, from any cause, to understand what is said, there is no publication. If, therefore, slanderous words are uttered in French or German to a person who does not understand these languages, or in the presence of a man who has totally lost his hearing, it is not such a publication as will make the speaker liable to an action, because no one has comprehended the meaning of the slanderous words. A distinction is made in this respect between written and spoken words, because when the words are committed to writing, they may be seen afterward by those who can understand them.³⁵

2259. The slander must be published *respecting the plaintiff* in order to entitle him to damages; a mother cannot, therefore, maintain an action for calling her daughter a bastard,³⁶ because, although the inference is irresistible that if the daughter is a bastard, the mother must have been guilty, yet as she was not slandered, she cannot maintain an action.³⁷

2260. Though formerly more latitude was allowed when a man *repeated* a slander which he had heard from another, yet, now, the courts are inclined to hold the repeater very strictly, and to allow no justification or excuse because he had heard it from another, unless he repeats the exact words he has heard, or at least their substance, without any addition or change on his part, and gives the name of his informer.³⁸

2261. To render words actionable they must be uttered without legal occasion. Sometimes it is justifiable to utter slanderous words of another; at other times it is excusable, provided they are uttered without express malice. It is justifiable for an attorney to use scandalizing expressions in support of his client's cause when they are pertinent to it;³⁹ but respectable counsel will never indulge in invective against the opposite party, except when justice imperiously demands such a course. Members of congress and other legislative assemblies cannot be called to an account for anything said in debate.

³³ Goodrich v. Stone, 11 Metc. Mass. 486.

³⁴ Miller v. Butler, 6 Cush. Mass. 71; McLaughlin v. Russell, 17 Ohio, 475; Smawley v. Stark, 9 Ind. 386.

³⁵ The slander must be spoken to some third person to constitute a publication. Uttering slanderous words in the presence of the person slandered only is not actionable. Sheffield v. Van Deusen, 13 Gray, Mass. 304. And it must be heard by such third person; but, in the absence of other proof, he will be presumed to have heard it if the circumstances were such that he might have heard it. Burbank v. Horn, 39 Me. 233.

³⁶ Maxwell v. Allison, 11 Serg. & R. Penn. 343.

³⁷ It makes no difference whether the person slandered is described by name or otherwise; he is sufficiently described if it can be shown certainly to apply to him and to no one else. Sumner v. Buel, 12 Johns. N. Y. 475. The plaintiff cannot extend the language by innuendo so as to make it applicable to himself. Swan v. Tappan, 5 Cush. Mass. 104; Robinson v. Drummond, 24 Ala. n. s. 174.

³⁸ McPherson v. Daniels, 10 Barnew. & C. 363. One who repeats a slander really publishes a new slander, and is responsible therefor. Kenney v. McLaughlin, 5 Gray, Mass. 3. This rule applies to newspapers copying from another paper. Sanford v. Bennett, 24 N. Y. 20. It is no justification that a rumor was current before the publication. Harkins v. Lumsden, 10 Wisc. 359.

If the defendant gives the name of his informer at the time of publication, this fact is admissible in evidence to disprove malice. Haynes v. Leland, 29 Me. 233; Cummerford v. McAvoy, 15 Ill. 311; Church v. Bridgeman, 6 Miss. 190.

³⁹ But an attorney is liable for slander if the words spoken are irrelevant, uncalled for, and malicious. Hastings v. Lusk, 22 Wend. N. Y. 410; Jennings v. Paine, 4 Wisc. 358; Hoar v. Wood, 8 Metc. Mass. 193.

No action for slander lies against a witness for words spoken in his testimony, though they are untrue and spoken from malice.⁴⁰

There are many communications which would be slanderous, but which become privileged communications from the circumstances under which they are spoken. Thus one may make statements injurious to a third party, where they are required to protect his own interests and made to those under him, or connected with him in business. Of this nature are communications among partners in regard to the credit of parties with whom they have dealings,⁴¹ or cautioning his employees against a suspected incendiary.⁴² But such communications must be made in good faith, by the proper party, and only to such parties as are necessarily informed.⁴³

2262. *Malice*, considered in relation to torts, is the doing unlawfully an act injurious to another without a just cause. This term when applied to torts does not necessarily mean what must proceed from a spiteful, malignant, or revengeful disposition, but a conduct injurious to another, proceeding from an ill-regulated mind, not sufficiently cautious before it occasions injury to another.⁴⁴

In some cases when a slander has been published the law implies the fact that the charge was malicious from the mere circumstance that it was false; and the question for the jury is, not whether the intention of the publication was to injure the plaintiff, but whether the tendency of the matter published was so injurious.⁴⁵ When, *prima facie*, it seems that the party speaking acted from good motives, and the object of the communication is to prevent the person to whom the representation is made from falling into error, and not to injure the party against whom it is made, express malice must be proved.⁴⁶

2263. A party who is aggrieved by the slander of another has but one remedy when the slander is oral, which is an action on the case for damages. But when the slander is written, as in the case of a libel, his remedy is not only an action on the case, but the libeller may be indicted. It may in some cases be advisable to indict the slanderer, as where the libel imputes immorality, which cannot be so well negatived by the testimony of others, for in that case the party slandered may support the prosecution by his evidence, and negative all imputations on his character.

The injured party may adopt both remedies at the same time.

⁴⁰ *Calkins v. Sumner*, 13 Wisc. 193; *Grove v. Brandenburg*, 7 Blackf. Ind. 234; *Barnes v. McCrate*, 32 Me. 442.

⁴¹ *Lewis v. Chapman*, 16 N. Y. 369.

⁴² *Lawler v. Earle*, 5 All. Mass. 22; *Easley v. Moss*, 9 Ala. N. S. 266.

⁴³ *Gassett v. Gilbert*, 6 Gray, Mass. 94. The report of the officers to the stockholders of a corporation of the result of an investigation into their agents' conduct is privileged, but this does not justify them in printing it for distribution to the public. *Philadelphia R. R. v. Quigley*, 21 How. 202.

⁴⁴ *Weckerley v. Geyer*, 11 Serg. & R. Penn. 39, 40; *Duncan v. Thwaites*, 3 Barnew. & C. 584.

⁴⁵ *Fisher v. Clement*, 10 Barnew. & C. 472.

⁴⁶ See *Peacock v. Reynell*, 2 Brownl. 151; *Starkie, Slander*, 441.

CHAPTER III.

MALICIOUS PROSECUTION AND ARREST.

- 2264-2274. Malicious prosecution.
- 2265. The nature of the prosecution or arrest.
- 2267. Who may be sued for malicious prosecution.
- 2269. Malice and want of probable cause.
- 2270. The proceedings must have been regular.
- 2271. The malicious suit must be ended.
- 2272. The damages for malicious prosecution.
- 2273. The remedy for malicious prosecution.
- 2275-2279. Injuries to personal liberty.
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- 2278. Remedies for false imprisonment.

2264. *Malicious prosecution* or malicious arrest is a wanton or vexatious prosecution or arrest, made by a prosecutor in a criminal proceeding, or a plaintiff in a civil suit, without probable cause, by a regular process and proceeding which facts did not warrant, as appears by the result, by which the party prosecuted or arrested has sustained damages.¹

An analysis of this definition will point out as the proper subjects of inquiry the nature of the prosecution or arrest, who is liable, what are malice and probable cause, the regularity of the proceedings in which the prosecution or arrest took place, the result of these proceedings, the damages, and, afterward, the remedy.

2265. The original suit is either a criminal prosecution; as, an indictment, a charge of a crime before a magistrate,² or a conviction before a magistrate, or it is a civil action.

A complainant who has a just cause of complaint is not authorized to add a groundless one, and prosecute both together; if that part which is groundless has subjected the plaintiff to an inconvenience, to which he would not have been exposed had the valid cause of complaint alone been insisted on, it is injurious; as, when an indictment for perjury contains various assignments, some of which are well founded, while others have been added maliciously, and without probable cause to authorize their insertion, an action as to these last may be maintained; because they would have been injurious if they had stood alone, and they are not made the less so by being coupled with other charges which are warranted.³

Upon the same principle, such an action may be supported by one, who, though indebted to the defendant in a bailable sum, has been arrested by him for a larger amount than the sum due,⁴ or where an attachment is maliciously

¹ See *Kerr v. Workman*, Add. Penn. 270.

² *Miller v. Brown*, 3 Mo. 127.

³ *Reid v. Taylor*, 4 Taunt. 616; *Buckley v. Wood*, 4 Coke, 14.

⁴ See *Savage v. Brewer*, 16 Pick. Mass. 453; *Ray v. Law*, Pet. C. C. 207.

made on the pretext that the party is about to remove from the state or secrete his property from his creditors.⁵

2266. But in order to support an action for a malicious arrest, the process must have been regular; for when it is irregular and wholly illegal or misapplied, it is as though no process had been issued, and the wrong doer will be liable accordingly. And when process has been set aside by the court as being illegal and irregular, not only the plaintiff, but his attorney, will be liable to an action, though such process will justify the officer who served it if the court had jurisdiction; for the officer cannot inquire into the legality of the process, but he is bound to know that the court has jurisdiction of the subject matter, and over the parties.⁶

2267. When there is but one prosecutor or plaintiff who has caused a malicious prosecution or arrest, the suit must of course be brought against him alone; the action lies also against a mere informer.⁷ But when the proceedings are regular an action does not lie against an attorney who has been employed in the case.⁸

2268. All who joined in instituting a vexatious suit may be made co-defendants, for the injury to the plaintiff was occasioned by an act in which all participated;⁹ therefore, if the suit was a civil action, not only is the plaintiff in such action bound to render a compensation, but a stranger who has procured its institution jointly with such plaintiff is liable to the action, although he is not to be benefited by the event.¹⁰

But grand jurors who give information to their fellow jurors, on which the prosecution proceeds, are not liable for a malicious prosecution, because a grand juror is bound by his oath to disclose to his fellow jurors all crimes of which he is connusant.¹¹

On the same ground a magistrate who procures witnesses to appear against a party indicted, and indorses his name on the indictment, does not render himself liable to an action for a malicious prosecution, it being his duty so to act.

2269. To entitle the party injured to an action for a vexatious suit there must not only be a malice, which is the doing unlawfully an act injurious to another without a just cause, but there must be a want of probable cause of action.¹²

When there are grounds for suspicion that a person has committed a crime or misdemeanor, and public justice and the good of the community require that the matter should be examined, there is said to be probable cause for making a charge against the accused.¹³

⁵ *Fortman v. Rottier*, 8 Ohio, St. 548; *Hodson v. Howlett*, 32 Ala. n. s. 478.

⁶ *Codrington v. Lloyd*, 8 Ad. & E. 449; 15 East, 615, note (e).

⁷ *Randal v. Henry*, 9 Ala. 367.

⁸ *Bicknell v. Dorion*, 16 Pick. Mass. 478. Unless he has been guilty of malice. *Warfield v. Campbell*, 35 Ala. n. s. 349; *Wood v. Weir*, 5 B. Monr. Ky. 544.

⁹ It is not necessary to show any conspiracy other than the fact that the parties all promoted the former suit. *Page v. Cushing*, 38 Me. 523.

¹⁰ *Shoftbey v. Waller*, Lane, Exch. 50; *Dreux v. Domee*, 18 Cal. 83. Where one without authority prosecutes a groundless action in the name of another, he is liable to the defendant for the expense and damage thereby caused. *Moulton v. Lowe*, 32 Me. 466; and he is liable even if there is no malice. *Bond v. Chapin*, 8 Metc. Mass. 31; *Foster v. Dow*, 29 Me. 442.

¹¹ *Black v. Sugg*, Hard. Ky. 556. A citizen who from proper motives lays facts within his knowledge before the grand jury is not liable therefor. *Goodrich v. Warner*, 21 Conn. 432.

¹² *Cecil v. Clarke*, 17 Md. 508; *Wade v. Walden*, 23 Ill. 425.

¹³ A general belief in the party's guilt is admissible to show probable cause. *Barron v. Mason*, 31 Vt. 189.

Probable cause will always be presumed, and, therefore, he who sues for a malicious prosecution will be required to show a want of it.¹⁴

When probable cause does not exist malice may be inferred;¹⁵ but the want of probable cause is never inferred from the most express malice.¹⁶

2270. To entitle the plaintiff to recover for a malicious prosecution the proceedings must have been *regular* in the ordinary course of justice, and before a tribunal having power to ascertain the truth or falsity of the charge, and to punish the offender, the now plaintiff; for when the proceedings are irregular the prosecutor is a trespasser.

2271. The malicious prosecution or malicious suit *must be ended*, for until it has been decided it cannot be said to have been entirely groundless, and this the plaintiff, who sues to obtain damages for a vexatious suit, is bound to show, either by his acquittal of a criminal charge, or by obtaining a judgment in his favor in a civil action.¹⁷

2272. The party aggrieved must have sustained *damages* to entitle him to recover for a malicious prosecution; but then the bare possibility of damages will be sufficient to sustain the action.

A man may be impaired in his person, his reputation, his estate, and his relative rights. If he has been maliciously accused of a crime, a prosecution commenced against him, and he has been cast into prison, the offence is complete.¹⁸ And although he has been left at liberty, and his character has been unstained by the proceeding, as where he has been indicted for a trespass, which is not indictable, yet, if he necessarily incurs expenses to defend himself from the charge, he has a right to recover for such loss. And if a master loses the services and assistance of his domestic in consequence of a vexatious suit, he may claim a compensation.

When a party sustains damage resulting from a civil action, prosecuted in a court of competent jurisdiction, the only detriment the party can sustain is the imprisonment of his person or the seizure of his property; for as to all expenses he may be put to, this, in contemplation of law, has been fully compensated to him by the costs adjudged.

2273. *The remedy* for a malicious prosecution is an action on the case to recover damages for the injury sustained.

¹⁴ O'Grady v. Julian, 34 Ala. N. S. 88; Israel v. Brooks, 23 Ill. 575; Dauchy v. Salisbury, 29 Conn. 124. The acquittal of the plaintiff does not necessarily show a want of probable cause. Kidder v. Parkhurst, 3 All. Mass. 393; Thorpe v. Balliett, 25 Ill. 339.

¹⁵ Blunt v. Little, 3 Mas. C. C. 112. But this presumption may be rebutted. Center v. Spring, 2 Iowa, 393.

¹⁶ Murray v. Long, 1 Wend. N. Y. 140; Pangburn v. Bull, 1 id. 345. The question of malice and of want of probable cause is a question of fact for the jury. Ritchey v. Davis, 11 Iowa, 124; Potter v. Searle, 8 Cal. 217. But if the facts are not controverted, the question whether they constitute probable cause is for the court. Cloon v. Gerry, 13 Gray, Mass. 201; Besson v. Southard, 10 N. Y. 236; Marks v. Gray, 42 Me. 86. If the prosecutor acts under legal advice, this is *prima facie* evidence to disprove malice, but may be rebutted by express proof of malice. Davenport v. Lynch, 6 Jones, No. C. 545; Raver v. Webster, 3 Iowa, 502; Fisher v. Forrester, 33 Penn. St. 501; Bliss v. Wyman, 7 Cal. 257.

¹⁷ Hewit v. Wooten, 7 Jones, No. C. 182; Wheeler v. Nesbitt, 24 How. 544; Wood v. Laycock, 3 Metc. Mass. 192. It is not necessary that the suit should proceed to final judgment, for an action for malicious prosecution may be founded on an indictment which is rejected by the grand jury. Stancliff v. Palmeto, 18 Ind. 321. Woodruff v. Woodruff, 22 Ga. 237. So, if judgment is arrested, this alone is not enough to sustain a suit for malicious prosecution. Kirkpatrick v. Kirkpatrick, 39 Penn. St. 288. No action lies if the previous suit terminates by a *nolle prosequi*. Brown v. Lakeman, 12 Cush. Mass. 482; or where the party escapes conviction on a technical point. Sears v. Hathaway, 12 Cal. 277; Robson v. Comstock, 8 Wisc. 372.

¹⁸ Saville v. Roberts, Carth. 416. Evidence of general bad reputation is admissible in reduction of damages. Fitzgibbon v. Brown, 43 Me. 169; Martin v. Hardesty, 27 Ala. N. S. 458.

The damages which are to be thus recovered are general or special. General damages are such as the law implies to have accrued from the act of the malicious prosecutor, and the party aggrieved is not required to specify or prove what injury he has sustained.¹⁹

2274. Special damages are such as really took place and are not implied by law; these are superadded to general damages arising from an act injurious in itself. Special damages must be the legal and natural consequences of a tort, and not a mere wrongful act of a third person or a remote consequence.

2275. By *personal liberty* is meant the independence in our actions of all other will than our own.²⁰ The infraction of personal liberty has ever been regarded as one of the greatest personal injuries. The injuries to personal liberty are malicious prosecutions or arrests, already considered, and false imprisonment, which will now be considered.

2276. *Imprisonment* is the restraint of a person contrary to his will.²¹ It is either lawful or unlawful. When lawful, it is evident it can be no injury to the person arrested for which he can maintain an action.

The constitution of the United States and of the different states require arrests to be made on a warrant duly issued and founded on a complaint under oath; but this provision does not prevent peace officers from arresting without warrant persons who are reasonably suspected of having committed a felony,²² and every citizen who is called upon is bound to assist an officer in such cases. Private persons may arrest without warrant persons who have committed a felony, but their justification depends on the actual guilt of the person arrested, not upon reasonable suspicion.²³ A constable or other peace officer may without warrant arrest a person who has committed a breach of the peace within his view, and detain him a reasonable time for the purpose of making a complaint.²⁴ But he is guilty of a trespass if he do not within a reasonable time take him before a magistrate, make a complaint, and obtain a warrant.²⁵

2277. An unlawful imprisonment, commonly called *false imprisonment*, means any intentional detention of the person of another not authorized by law.²⁶ An unlawful confinement or detention in a prison or private house, or even a forcible detention in the street, or the unlawful touching of a person by a peace officer by way of arrest, are false imprisonments.²⁷ And an unlawful detention of a person who has been arrested, although the first arrest was lawful, amounts to a new arrest, and consequently it is a false imprisonment.²⁸

False imprisonment is frequently the consequence of an arrest under an illegal or void process. A distinction must be made between arrest under legal and under illegal process.

When the process is regular and issued out of a court of competent jurisdiction, it is a complete justification to the ministerial officer who has been called upon to execute it, for he is not to judge of the regularity of the process, and he is bound to execute it at his peril; for example, when an execution was issued on a satisfied judgment; but in such case the plaintiff would not be protected

¹⁹ 1 Chitty, Pl. 386; Hammond, Nisi P. 40.

²⁰ Wolffius, Inst. Nat. § 77.

²¹ 2 Inst. 589; Baldw. C. C. 239, 600.

²² Rohan v. Sawin, 5 Cush. Mass. 285.

²³ Wakely v. Hart, 6 Binn. Penn. 316; Brockway v. Crawford, 3 Jones, No. C. 433.

²⁴ Vandever v. Mattocks, 3 Ind. 479.

²⁵ Burke v. Bell, 36 Me. 317.

²⁶ Johnson v. Tompkins, Baldw. C. C. 571.

²⁷ Bacon, Abr. *Trespass*, D, 3; Pike v. Hansom, 9 N. H. 491; Courtoy v. Dozier, 20 Ga. 369.

²⁸ Withers v. Henley, Croke, Jac. 379.

by the writ, for it was he who put it in motion, and he was then a wrong doer.²⁹ And although a constable would be protected by an alias execution issued by a justice of the peace after the debt had been paid under the first, the justice as well as the plaintiff would be liable, although the plaintiff had represented that the first execution was lost.³⁰

When the process is wholly void, for want of jurisdiction, none of the parties who issued it, or put it in motion, can be protected under it. A tribunal proceeding under special or limited powers decides at its peril; and if the court had not jurisdiction, the judges, the attorney, and the party will be liable to an action for false imprisonment when the defendant has been arrested under its process.³¹ Even a ministerial officer will be liable if it appear on the face of the process that the court had no jurisdiction.³²

In those cases where the process has been misapplied, as to the person intended to be imprisoned; as, for example, where process is issued against A B, and under it C D is arrested, the latter may bring suit not only against the plaintiff who authorized the arrest, but also against the ministerial officer, for a command in the writ to arrest A B cannot justify the arrest of C D.³³

2278. The most efficacious and prompt remedy for false imprisonment is the writ of *habeas corpus*. This is the best calculated to remove the injury and to obtain the liberty of the party aggrieved. This celebrated writ, which has been the boast of English lawyers, is an imitation of the interdict of the Roman law, *de homine libero exhibendo*. When a freeman was restrained of his liberty by another, contrary to good faith, the prætor ordered by his interdict that such person should be brought before him, that he might be liberated.³⁴

2279. A person who has been unlawfully imprisoned has also remedy by action against all who have been active in procuring his imprisonment, unless they are justified by the process of a superior officer.

When the process is wholly void, or it has been misapplied by arresting the wrong person, the party injured may maintain trespass;³⁵ when the imprisonment is under color of regular criminal or civil process the remedy is by an action on the case; provided that in this latter case there was no probable cause for instituting the proceedings, and, in general, the acquitted party will be required to prove that there was no such probable cause.

²⁹ *McGuinty v. Herrick*, 5 Wend. N. Y. 240. A citizen who assists an officer at his request to make an arrest is not liable, whether the arrest is proper or not. *McMahan v. Green*, 34 Vt. 69.

³⁰ *Lewis v. Palmer*, 6 Wend. N. Y. 367.

³¹ *Cable v. Cooper*, 15 Johns. N. Y. 152.

³² *Smith v. Shaw*, 12 Johns. N. Y. 257; *Savacool v. Boughton*, 5 Wend. N. Y. 170.

³³ *Bacon*, Abr. *Trespass*, D; 2 Rolle, Abr. 552 (O), pl. 5.

³⁴ Dig. 43, 29, 1. The form of the interdict was "*quem liberum dolo malo retines, exhibeas*." I order that you bring before me the free person whom you retain in bad faith. See before, 211.

³⁵ *Stanton v. Seymour*, 5 McLean, C. C. 267; *Price v. Graham*, 3 Jones, No. C. 545.

CHAPTER IV.

INJURIES TO RELATIVE RIGHTS.

- 2280. Injuries to the relative rights.
- 2281-2287. Injuries to the rights of husband and wife.
- 2282-2284. To the rights of the husband.
- 2283. Criminal conversation.
- 2284. Injury to the wife's person.
- 2285. Injury to the rights of the wife.
- 2288-2293. Injuries to the rights of parent and child.
- 2289-2292. To the rights of parents.
- 2290. Seduction of children.
- 2292. Abduction of children.
- 2293. Injuries to the rights of children.
- 2294. Injuries to the rights of guardian and ward.
- 2295-2297. Injuries to the rights of master and apprentice.
- 2296. To the rights of the master.
- 2297. To the rights of the apprentice.
- 2298-2300. Injuries to the rights of employer and employed.
- 2299. To the rights of the employer.
- 2300. To the rights of the employed.

2280. *The injuries to the relative rights of persons are those which affect husband and wife, parent and child, guardian and ward, master and apprentice, and employer and employed.*

2281. There must in general be, or presumed to be, a legal marriage subsisting between the parties in order to entitle them to those relative rights which subsist between husband and wife, the violation of which is an injury.

2282. The injuries which violate a man's rights as husband are those which affect him principally, committed upon the wife; and those which affect the wife principally, and are consequentially tortious toward him.

2283. He has an interest in her fidelity; *criminal conversation* or adultery with her, renders her for the future more or less unfit to discharge her relative duties, and so the interests of her husband are deteriorated by their non-performance.

The husband may, however, at his pleasure reinstate the adulteress in her former relation; and as a second adulterer, by still further debasing her moral principles, renders her less capable to fulfil her duties, it follows that his offence is injurious to the husband as well as the first, different from it, in the inconvenience it occasions, only in degree. So if the illicit intercourse has been carried on between the wife and several persons during the same period, the husband, having received an injury from each, is entitled to a compensation from each.¹

Even when the woman is a common prostitute, if her course of life is not suffered willingly by her husband, he may have an action for adultery with her; but any connivance on his part will deprive him of a right of action; as, in

¹ Gregson v. McTaggart, 1 Campb. 415.

that case, he would receive no injury, *volenti non fit injuria*;² and when his conduct has been censurable in not taking proper care of the morals of his wife, he will be entitled only to diminished damages.

2284. An injury committed by a third person on the wife's person is an injury to the husband. For such injury the husband and wife must join in an action for the recovery of the damages; but when the injury is such that the husband receives a separate damage or loss, as if, in consequence of a battery, he has been deprived of her society or been put to expense, he may bring a separate action in his own name;³ and for slander of his wife, when the words are not actionable in themselves, and the husband has received special damage, he must sue alone.⁴

2285. A wife has some rights against third persons, and even against her husband, for injuries committed upon her person. But in all cases when she sustains an injury her husband must be joined with her in bringing a civil action to redress the wrong.

Contrary to the general rule that a wife cannot sue her husband, for her protection the law allows her, when by the husband's bad usage or threats her life is put in danger, to obtain sureties of the peace, by applying to a proper officer. And, generally, she may compel him to pay her a just alimony when, by his desertion or cruelty, he has forced her to separate from him. The courts will also compel the husband to pay reasonable fees to her counsel in all such cases.

2286. Though, in general, the husband has the lawful custody of the wife, yet if she be unlawfully restrained, she may sue out a writ of *habeas corpus* to obtain her liberty.

2287. We have seen that, when the wife commits adultery, the husband has an action against her paramour for the injury done to him. In this respect the law does not give a just reciprocity to the wife. She has no remedy for the injury done to her by the husband's infidelity; for this, if for no other reason, that she cannot sue alone, and the husband cannot recover damages jointly with his wife against the partner of his guilt.

2288. The rights between *parent and child* result from the legality of the marriage of the parents. When this kindred is established or presumed, the parties have rights and are bound by reciprocal duties to each other.

2289. A father is the natural guardian of his children, and he has therefore an interest in their persons, so that at any age he may defend them from all injuries, even by forcible means. He is entitled to their custody, and any act by which he is unlawfully deprived of it is a wrong to him. And when he has sustained special damages in consequence of the beating of his child, as where he has been compelled to employ a physician or a nurse, he may maintain an action to recover damages.⁵ But this right is limited to the infancy of the child and before he becomes of age, for after that period the father can recover no damages for an injury to him.

2290. For the *seduction* of his female child a father has no right, as such, to recover damages, because, unless she fills the capacity of a servant at the time of the seduction, the law presumes he sustained no damages, and it gives no compensatory remuneration for the feelings of the father;⁶ for, to the discredit

² 4 Term, 657. See Shelford, Marr. & D. 449.

³ McKinney v. Western Stage Co., 4 Iowa, 420.

⁴ 1 Lev. 140; Russell v. Corne, 1 Salk. 119. If the words are actionable in themselves, the wife must be joined. Johnson v. Dicken, 25 Mo. 580.

⁵ Dennis v. Clark, 2 Cush. Mass. 347; Durden v. Barnett, 7 Ala. N. S. 169; Arnold v. Norton, 25 Conn. 92; Kennard v. Burton, 25 Me. 39.

⁶ Flemington v. Smithers, 2 Carr. & P. 292; 4 Barnew. & C. 660; 7 Dowl. 133; see Seager v. Sligerland, 2 Caines, N. Y. 219; Doyle v. Jessup, 29 Ill. 460.

of the law be it said, it gives no direct remedy to the unfortunate woman's parents.

If the daughter is a minor, the relation of master and servant is presumed to exist although she is actually in the service of another, if the parent still has a right to claim her wages.⁷ If the daughter is over twenty-one, she must be shown to be in the service of her father.⁸ An action may be maintained by one standing *in loco parentis* as guardian.⁹

2291. When a master sues for the seduction of his servant, not being the parent of the servant, he must prove the contract of hiring, for on that rests his whole case; but when, in addition to the relation of master and servant, that of parent and child also exists, the rule of the common law is so far relaxed that employment in acts of service is equivalent to a state of servitude; and in such case, by reason of the plaintiff's paternity, proof of no more than slight and desultory acts of service when the child had come of age will be sufficient evidence of hiring. Still, however, a state of servitude of some sort must be established.¹⁰

2292. Another injury to the relative rights of a parent is the *abduction* of his children; for this he also assumes the character of master. The remedy is by action on the case, *per quod servitium amisit*. In such case, as in that of seduction, the slightest evidence is sufficient to support the relation of master and servant.¹¹ The father of a woman who has an illegitimate child stands toward such child *in loco parentis*, and may sustain an action for its abduction.

2293. Though the father has the control of his children, and he may correct them for their good, yet if by excessive beating he endangers their lives or their health, the law will interfere, and the father may be punished for an assault and battery, or, if he imprisons them, the courts will discharge them on a *habeas corpus*. Happily but few cases of such cruelty so revolting to our nature can be found.

If a father by his cruelty and abuse induces an infant child to escape from him for fear of personal violence and abuse, and he cannot with safety return to live with him, he gives by such act authority to a stranger to furnish such a child necessary support and education, and he will be liable for the amount so expended for him.¹²

2294. The rights of *guardian and ward* much resemble those of parent and child. The guardian is considered as standing in the place of the father, and of course the relative powers and duties of guardian and ward correspond in a great measure to those of parent and child. In some respects they differ. The father is entitled to the services of the child, and is bound to support him; the guardian is not entitled to the services of the ward, and is not bound to maintain him out of his own estate.

For an injury done to the ward by a stranger the guardian may bring a suit in the name of the child to recover damages.

2295. To create the relation of *master and apprentice* there must be a lawful contract entered into between the parties. This, as has been explained in another place,¹³ should be by deed. There are cases in which the master cannot sue for the abduction of the apprentice unless the relation between them has been duly constituted;¹⁴ though in general a third person cannot protect him-

⁷ Bolton v. Miller, 6 Ind. 262.

⁸ Keller v. Donnelly, 5 Md. 211; Nickleson v. Stryker, 10 Johns. N. Y. 115.

⁹ Ball v. Bruce, 21 Ill. 161; Bracy v. Kibbe, 31 Barb. N. Y. 273.

¹⁰ Moritz v. Garnhart, 7 Watts, Penn. 302.

¹¹ Moritz v. Garnhart, 7 Watts, Penn. 302, 303.

¹² Staunton v. Wilson, 3 Day, Conn. 37.

¹³ Gye v. Felton, 4 Taunt. 876.

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¹⁴ Before, 402.

self from liability to an action for seducing away or detaining a servant, *per quod servitium amisit*, by setting up any formal objection to the contract of apprenticeship, or hiring while the service was continuing, and the apprentice himself is liable to be punished for running away, although the indenture be voidable, as he ought to have first avoided it by a reasonable notice.¹⁵

2296. The master has such an interest in his apprentice that he may defend him with force,¹⁶ and he may maintain an action for the battery of the apprentice, or for debauching him, or for any other injury to him, if any loss of service ensues.¹⁷

The most common injuries to the master are the seduction of his female servants or apprentices; the master has an action against the seducer, though not directly and ostensibly for the seduction, but because she is disabled by the act of the defendant from performing those services which she owed to her master.

This rule applies to all kinds of masters and every variety of servant, so that when a father sues for the seduction of his daughter he must assume the less endearing name of master, to entitle him to a compensation; and if it cannot be proved that she has filled that office, the action cannot be sustained.¹⁸ But the least service which she may have performed will be sufficient, as, milking the cows;¹⁹ it is, however, requisite that a specific contract or acts of service be established.

2297. Apprentices are a very valuable class of citizens, who in time become important members of society and well deserving the special care and protection of the law. They are entitled to good treatment from their masters in return for their obedience, submission, and faithfulness; if, therefore, the master withhold proper maintenance from the apprentice, or proper instruction, the magistrates and courts will in general compel him to do justice; provisions to compel the master in such cases to fulfil his engagement are to be found in the statutes of most of the states.

And if a master, by cruelty, endanger the life of his apprentice, or, by his bad example, expose his morals to corruption, the apprentice will be discharged from his indentures.

2298. When the relation of *employer and employed* exists by a valid contract, and the master or employer is entitled to the services of the servant or person employed for a definite time, rights and duties exist on both sides, and when these are violated they are injuries.

2299. As the master is entitled to the services of his servant, it is evident that when an injury is committed against the servant, by which the master is damnified, the latter may have an action for the injury done to him. Enticing a workman who is employed by another for a definite time, before such time has expired, is an injury committed to his employer, and this though he be but a journeyman.²⁰ And if a servant leave his master's employment without just cause, and a third person retain him and knowingly harbor him, so as to deprive the master of his services, an action lies.²¹ But a person entitled to the

¹⁵ *Ashcroft v. Bertles*, 6 Term, 652. See 2 H. Blackst. 511.

¹⁶ Before, 408.

¹⁷ *Woodward v. Washburn*, 3 Den. N. Y. 369.

¹⁸ *Grinnell v. Wells*, 7 Mann. & G. 1033; *Dean v. Peal*, 5 East, 45; *Postlethwaite v. Parkes*, 3 Burr. 1879; *Campbell v. Cooper*, 34 N. H. 49.

¹⁹ *Bennett v. Allcott*, 2 Term, 168; see *Moran v. Dawes*, 4 Cow. N. Y. 412.

²⁰ *Hart v. Albridge*, Cowp. 54.

²¹ *Bacon, Abr. Master and Servant* (O). *Seidmore v. Smith*, 13 Johns. N. Y. 322. See *Boston Glass Manufactory v. Binney*, 4 Pick. Mass. 425; *Dubois v. Allen*, Anth. N. Y. 94; *Butterfield v. Ashley*, 2 Gray, Mass. 254.

services of another, who stands by and permits a third person to avail himself of such services, without interposing a claim, or giving notice of his right, cannot maintain an action for such services, the law requiring of every one who claims to recover for the tortious acts of another, that he should himself come with clean hands, for if he has connived or assented to the wrong, he has not been injured.²²

For a battery or other unlawful injury committed upon a servant, when the master sustains special damages, the master as well as the servant may bring an action, and each shall recover damages, for both have sustained an injury—the servant in his person, and the master in the loss of his servant's labor.²³

A master may be injured also by the acts of his servants, either toward himself or with regard to third persons. When an injury arises to a third person from the negligence of a servant while in the lawful and authorized employment of the master, the latter is responsible for the consequences.²⁴ Among the numerous cases of this kind only a few examples need be mentioned. Where, by unskilful management of a raft, a servant committed an injury to another on the river, the owner of the raft was held responsible.²⁵ A driver who by carelessness injures a passenger, by upsetting his carriage, is guilty of such negligence as to make his employer responsible for the injury.²⁶ The master is made responsible in these cases because he is bound to employ none but careful persons, and he is a guarantor of their conduct while they are in his lawful service.

But when the servant commits a tort without any authority, express or implied, of the master, the latter is not responsible to third persons for such wrongful act, and the servant is alone answerable for the consequences.²⁷

Indeed, in some cases, the master is responsible not only civilly but criminally for the wrongful acts of his servants; as, where a baker's servant mixed poisonous substance with the bread, the master was held liable to a civil action, and also to an indictment; and he is similarly responsible for the publication of a libel by his servant in the course of his business.²⁸

2300. The servant, although bound to obey the lawful commands of the master, cannot be compelled to do so by corporal punishment; and if the master beat him, it is a trespass. The right of correction does not extend to servants in husbandry, or to journeymen in trades, or to persons who are merely hired, and are not in the capacity of apprentices.

The master is bound to use reasonable care and diligence to prevent his servant being injured in the course of his employment; if he fails to do so, he is liable for the injury thereby caused.²⁹ But he is not liable for injuries caused to one servant by the negligence of his fellow servants.³⁰

²² *Demyer v. Souzer*, 6 Wend. N. Y. 436.

²³ *Bacon*, Abr. *Master* (P); *Woodward v. Washburn*, 3 Den. N. Y. 369.

²⁴ *O'Connell v. Strong*, Dudl. So. C. 265; *Drayton v. Moore*, Dudl. So. C. 268; *Harris v. Mabry*, 1 Ired. No. C. 240.

²⁵ *Shaw v. Reed*, 9 Watts & S. Penn. 72.

²⁶ *Maury v. Talmadge*, 2 McLean, C. C. 157; 2 Stark. 37.

²⁷ *Puryear v. Thompson*, 5 Humphr. Tenn. 397; *Campbell v. Staist*, 2 Murph. No. C. 389; see the *State v. Walker*, 16 Me. 241; *Earle v. Hall*, 2 Metc. Mass. 353; *Wright v. Weatherly*, 7 Yerg. Tenn. 367; *Brooks v. Olmstead*, 17 Penn. St. 24.

²⁸ *King v. Dixon*, 3 Maule & S. 11; *Rex v. Walter*, 3 Esp. 21.

²⁹ *Halloway v. Henley*, 6 Cal. 209; *Perry v. Marsh*, 25 Ala. N. S. 659.

³⁰ *King v. Boston R. R.*, 9 Cush. Mass. 112; *Madison v. Bacon*, 6 Ind. 205; *Carle v. Bangor R. R.*, 48 Me. 269; *Ryan v. Cumberland R. R.*, 23 Penn. St. 384.

CHAPTER V.

INJURIES TO PERSONAL PROPERTY.

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 - 2342. Neglect to execute or return writ.
- 2343-2348. Injuries from neglect of common carriers.
 - 2344. Who is liable as a common carrier.
 - 2345. What persons and property they must take.
 - 2347. Carrier's ability and tender of the fare.
 - 2348. Injuries after goods are accepted.
 - 2349. Injuries from acts of innkeepers.

2301. In another place,¹ we have examined the nature of personal property ;

¹ Book II, chs. 1-14.

its division into chattels real and chattels personal; the nature of chattels personal, or their being in possession or not in possession; the right to them being absolute or qualified; of the time when personal property may be enjoyed; the mode of acquiring and losing title to it; and the number and connection of the owners. It now remains to inquire what injuries may be committed to it. For this purpose we shall consider successively injuries: 1, to personal property in possession, 2, to the rights of remainder-men and reversioners, 3, to the rights of joint tenants and tenants in common, 4, to things not tangible; as, patent rights and copy rights, 5, deceits and misrepresentations, and, 6, injuries arising from neglect of duty.

2302. *Injuries to personal property in possession* may occur in several ways: by an illegal taking, by embezzlement, by damaging it, and by false pretences.

2303. The possession of personal property belongs to the owner, and any *unlawful taking* of such property is a wrong to him. The taking of property is either felonious or not felonious.

The felonious taking of personal property and carrying it away out of possession of the true owner is the crime of larceny. This falls under the cognizance of the criminal law.

The tortious taking of property will alone be considered in this place. The act of seizing and detaining personal property unlawfully is a trespass—a trespass being an unlawful act committed with violence, *vi et armis*, to the person, property, or relative rights of another.³

For such wrongful taking an action of trespass may be maintained, or the party injured may bring an action of trover and conversion, and such wrongful taking will be evidence of conversion,³ these two actions being concurrent in such cases. Replevin may also be maintained.⁴

When the property taken has been unlawfully converted and changed into another species, the title of the former owner is by this means destroyed; as, where grain, wrongfully taken, was converted into whisky, the whisky was held to belong to the manufacturer,⁵ he being liable to the owner of the grain for its value.

2304. Another kind of injury to personal property is by *embezzlement*, which is the fraudulent removing and secreting of personal property with which the party has been entrusted for the purpose of applying it to his own use. This kind of breach of trust was not punishable criminally at common law, but it is so punished by the local laws of perhaps all the states of the Union.

As a crime, it belongs to the head of criminal law; as a tort, the remedy of the owner is in trover, and his remedy is given him at common law in many cases which do not come under the statutory crime of embezzlement.

2305. By acts of congress the embezzlement of public property is punishable by fine and imprisonment.⁶

When the embezzlement of a part of the cargo takes place on board of a ship, either from the fault, fraud, connivance, or negligence of any of the crew, they

³ The remedy of trover is more extensive than that of trespass, as the latter is founded upon the wrongful taking and not on the conversion, which may exist without any wrongful taking. This taking may be forcible, or it may be implied by exercising a control over the property inconsistent with the owner's possession. In the latter case it will often be doubtful which is the proper remedy. Where a ship-owner refused to carry a passenger who had engaged passage, and proceeded on his voyage, giving him no reasonable opportunity to remove his trunk which was on board, it was held that trespass would lie, though trover would have been the only remedy if he had given opportunity to remove it. *Holmes v. Doane*, 3 Gray, Mass. 328.

⁴ 2 Saund. 47, k.

⁵ *Silisbury v. McCoon*, 6 Hill, N. Y. 425. Before, 505.

⁶ Acts of Congr. April 30, 1790, s. 16, 1 Stat. 116; April 20, 1818, s. 5; March 4, 1825, s. 24.

are all bound to contribute to the reparation of the loss in proportion to their wages. When the embezzlement is fixed on any individual, he is solely responsible; when it is made by the crew, or some of the crew, but the particular offender is unknown, and from the circumstances of the case strong presumptions of guilt apply to the whole crew, all must contribute. This is a rule of policy to prevent combinations among the crew by which one might take property which they might afterward share together.

The presumption of innocence is always in favor of the crew, and the guilt of the whole crew, or of some one or more of them, must be established beyond all reasonable doubt before they can be required to contribute.⁷

2306. By *damage to personal property* is understood the loss caused by one person to another's property, either with the design of injuring him, or by negligence, or carelessness, or by inevitable accident. The injuries to personal property are of two kinds, namely: criminal, or merely tortious without any criminality. The latter will alone be here made the subject of our inquiries. Let us consider what property may be damaged, by whom, in what manner, and when the damage may be justified or excused.

2307. The property which is subject to illegal or tortious damages must be tangible, for choses in actions and incorporeal rights cannot in this sense be damaged by any wrongful acts of others.

There can be no damage done where the party who complains of an injury had no property in the thing damaged. Animals *feræ naturæ*, entirely unreclaimed, are not the property of any one; if a damage is done to them, no action can be sustained on that account, although they may have been injured on the plaintiff's land. If the plaintiff has any cause of action, it may be for trespassing on the land, but not for killing or damaging such animal there.⁸

But where a reclaimed animal has no such intrinsic value that he can be the subject of larceny, as a dog,⁹ yet the owner has such property in him that he may maintain trespass for an unlawful injury to him; "for a man may have property in some things which are of so base a nature that no felony can be committed of them, as of a bloodhound or mastiff."¹⁰

2308. The damage to personal property may be committed by bailees or others having the legal possession, or by strangers.

2309. Though the injury be the same, yet there is a great difference in the remedy, according to circumstances. When damage has been done by a third person, not having any legal or other possession, and the injury is direct, immediate, and committed with force, in fact, or implied in law, and the plaintiff was in possession, an action of trespass is the proper remedy; on the contrary, when the plaintiff was not in possession, the proper remedy is an action on the case. When the damages are consequential, or not committed with force, the remedy is an action on the case, whether the plaintiff was or was not in possession.

The damage may be caused by the defendant, or his authorized agent, or even by his animals, and he is responsible, in these last cases, as if he had himself committed the injury; subject to this distinction, that where the wrong is committed by his agent, without his express command, or by his animals, without any fault or action on his part, that he would not be liable for vindictive damages.

⁷ *Speer v. Pearson*, 1 Mas. C. C. 104; *Thompson v. Collins*, 4 Bos. & P. 347; *Lewis v. Davis*, 3 Johns. N. Y. 17; 1 Marshall, Ins. 241.

⁸ *McConico v. Singleton*, 2 Const. So. C. 244; *Broughton v. Singleton*, 2 Nott & M'C. So. C. 338; Bacon, Abr. *Trespass* (E).

⁹ 4 Sharswood, Blackst. Comm. 236; *Findlay v. Bear*, 8 Serg. & R. Penn. 571.

¹⁰ 12 H. 8, 3; 18 H. 8, 2; 7 Coke, 18, a.

2310. Many cases occur in practice when it is difficult to say who ought to be responsible. Such are cases of collision of ships, when one or both are injured. There are four possibilities under which an accident of this sort may occur.

It may happen without any blame being imputable to either party; as, when the loss is occasioned by a storm, or any other *vis major*; in that case the loss must be borne by the party on whom it happens to fall, the other not being responsible to him in any degree.

Both parties may be to blame; as, when there has been a want of due diligence or of skill on both sides; in such cases the loss must be apportioned between them, as having been occasioned by the fault of both of them.¹¹

The suffering party may have been the sole cause of the injury; then he must bear the loss.

It may have been the fault of the ship which ran down the other; in this case the injured party would be entitled to an entire compensation from the other.¹² The same rule applies to steamboats.

Another case has been put, namely, when there has been some fault or neglect, but on which side the blame lies is inscrutable, or the evidence leaves it in a state of uncertainty. In this case it does not appear to be settled whether the loss shall be apportioned or borne by the suffering party. Opinions on the subject are divided.

2311. The right of property being sacred, no one of his own accord can meddle with the goods of another, unless it be to rescue them from inevitable destruction, or to preserve his own from a misfortune about to be occasioned by those of another; as, where an animal, the property of one man, is chased or attacked by that of another, so that the life or safety of the former cannot be preserved unless by killing or restraining the other, it may be done.¹³ A dog caught in the act of killing sheep may therefore be killed to prevent his doing further mischief.¹⁴

2312. By *false pretences* is meant any untrue representations and statements made with a fraudulent design to obtain money, goods, wares, or merchandise, with intent to cheat.

This is a misdemeanor punishable by the criminal law in most of the states of the Union. As a false pretence is not a felony, the civil remedy is not suspended, and the party may maintain replevin, detinue, or trover.

2313. When a man is the absolute or general owner of personal property, and he is entitled to immediate possession, notwithstanding it is out of his custody, yet in contemplation of law he is actually possessed, and this is the meaning of the trite maxim, that "absolute property in personalty draws to it the possession."¹⁵

In general this right suffices, and the general owner of a personal chattel, though he never had the actual possession, may maintain trover or trespass for an injury as if he were in actual possession.¹⁶

But when the general owner of property has not the right of possession, as where by the terms of the grant or bequest to him he is to be entitled to it after the death of a person living, or when, on any other ground, his right of possession is only in remainder or reversion, or where he has parted with the right of possession, as by letting furniture for an unexpired term, then an injury to the chattel is not immediate to him, but consequential only, and for this reason

¹¹ *Simpson v. Hand*, 6 Whart. Penn. 311.

¹² 2 Dods. Adm. 83, 85; *Strout v. Foster*, 1 How. 89.

¹³ Bacon, Abr. *Trespass* (E).

¹⁴ *Barrington v. Turner*, 3 Lev. 28; *Croke, Jac.* 45.

¹⁵ *Burser v. Mustin*, *Croke, Jac.* 46.

¹⁶ 2 Saund. 47, and notes.

he cannot maintain trespass or trover for such a wrong, but he must declare specially in case for the injury to his reversionary interest.

2314. When personal property is held by several persons in common, and an injury is committed to it by a stranger, he is liable to the owners as if it was held in severalty.

As each of the owners has as good a right to use the chattel as the other, it is clear that neither can maintain trover or trespass against the other, although the latter may have taken exclusive use of their joint property;¹⁷ but when one of the joint owners sells or destroys the chattel the other may maintain such action;¹⁸ as, when the wheat of Peter was mixed with that of Paul, by consent of both parties, and Paul sold the whole, it was held that they were tenants in common, and that Paul was liable to Peter in trover.¹⁹ The reason for this distinction is this, that by a sale or destruction of the joint property there is a severance of the rights.²⁰

2315. The *things not tangible* to which an injury may be committed are of three kinds, namely: copy rights, the right to unpublished manuscripts, and patent rights.

2316. When treating of the nature of property we took a short view of the manner in which a *copy right* may be obtained, and for what it will be granted.²¹ It remains to consider what injuries may be committed against this right, and what redress the owner has for its infringement.

2317. The injury to a copy right consists in unlawfully printing, publishing, or importing, or causing to be printed, published, or imported, any copy of the book, map, chart, musical composition, engraving, cut, print, or other thing for which the copy right is lawfully secured, or in acting upon the stage any copy righted dramatic composition.²²

2318. Any person violating the exclusive right of the proprietor of a copy

¹⁷ *Farr v. Smith*, 9 Wend. N. Y. 338; *Fightmaster v. Beasley*, 7 J. J. Marsh. Ky. 410; *Gilbert v. Dickerson*, 7 Wend. N. Y. 449; *Comyn, Dig. Estate*, K, 8; *Dain v. Cowing*, 22 Me. 347; *Hurd v. Darling*, 14 Vt. 214; *Rank v. Rank*, 5 Penn. St. 211; *St. John v. Standing*, 2 Johns. N. Y. 468; *Cowan v. Buyers*, Cooke, Dist. Ct. 53. See *Wilson v. Reed*, 8 Wils. 175.

¹⁸ *Hyde v. Stone*, 7 Wend. N. Y. 354; *Herrin v. Eaton*, 13 Me. 193; *Weld v. Oliver*, 21 Pick. Mass. 559; *Farr v. Smith*, 9 Wend. N. Y. 338; *White v. Osborn*, 21 Wend. N. Y. 72.

¹⁹ *Newlin v. Colt*, 6 Hill, N. Y. 461.

²⁰ *Hinds v. Terry*, 1 Miss. 80.

²¹ Before, 515-524.

²² To constitute an infringement of a copy right, the article printed must be identical with that copy righted; and the question of identity is most difficult, and turns on most subtle distinctions. In few cases will there be an absolute identity *verbatim*, and the question is whether the differences between the two works are substantial, making a new work, or whether they are mere colorable deviations, adding nothing in value and originality, and requiring intellectual effort principally in evading the copy right. The identity may consist in matters of detail, as where the notes of a grammar were copied. *Gray v. Russell*, 1 Stor. C. C. 11. Where the work copy righted is compiled from materials open to all, it is no violation to use these materials, for this is demanded by the nature of the case. *Webb v. Powers*, 2 Woodb. & M. C. C. 497. The question in such cases is whether the work of the second author is the result of his own skill in the use of the common materials, or merely the result of the use of the first author's work. *Emerson v. Davies*, 3 Stor. C. C. 768; *Stowe v. Thomas*, 2 Am. Law Reg. 229. A copy right protects the whole book and every part of it, and it is an infringement to copy any part of it. If so much is taken that the value of the original is sensibly diminished, or the labors of the original author are substantially, to an injurious extent, appropriated, this constitutes a violation of the copy right. *Folsom v. Marsh*, 2 Stor. C. C. 100; *Story's Exrs. v. Holcombe*, 4 McLean, C. C. 309. Quotations from a copy righted book are allowable in certain cases, as for reviews; but this must not extend so as to form a substitute for the original work. In professional and scientific works, and in encyclopædias, the citation of the language of previous authors is necessary and legitimate within its proper limit, which may be said to be "the point where an injury may be perceived, which varies in each case." *Curtis, Copyr.* 252. See *Lawrence v. Dana*, U. S. C. C. Mass. Dist. "Boston Advertiser," Nov. 2, 1869.

righted book, print, cut, engraving, map, chart, musical composition, or photograph, shall pay fifty cents for every sheet of such book found in his possession, and one dollar for every sheet of such print, cut, engraving, map, chart, musical composition, or photograph, one-half to the United States, and one-half to the proprietor of the copy right, and shall forfeit to such proprietor the plate from which such print, etc., shall be printed.²³

Any person who violates the exclusive right of the author of a copy righted dramatic composition by acting it or causing it to be acted is liable for damages of not less than one hundred dollars for the first and fifty dollars for every subsequent performance.²⁴

2319. In addition to the penalties imposed by the act of 1831, the proprietor of a copy right has a remedy for damages by an action on the case.²⁵ But the most efficacious remedy is by bringing a bill in equity where he can obtain an injunction against any further infringement.²⁶

2320. The act of congress provides that any person who shall print or publish any manuscript whatever without the consent of the author or proprietor, obtained in writing, signed in the presence of two or more witnesses, (if such author or proprietor be a citizen of the United States, or resident therein,) shall be liable to suffer and pay to the author or proprietor all damages occasioned by such injury, to be recovered by a special action on the case, founded upon this act, in any court having cognizance thereof; and the several courts of the United States empowered to grant injunctions to prevent the violation of the rights of authors and inventors are thereby empowered to grant injunctions in like manner, according to the principles of equity, to restrain such publication of any manuscript as aforesaid.²⁷

2321. The laws regulating the issue of *patents* for inventors and designs have been treated of in another portion of this work.²⁸

2322. The patentee has the exclusive right of "making, using, and vending to others to be used," the invention or discovery, and consequently any other person who makes, uses, or vends the invention usurps the exclusive right of the patentee, and infringes the patent. It is not an infringement to sell the articles made by a patented machine.²⁹ The principal question in cases of alleged infringement is to decide whether the article is substantially the same as the patentee's invention. An infringement takes place when a party uses the invention without sufficient alteration to make it a new discovery. A mere colorable change, as by the substitution of a mechanical equivalent, will not prevent its being an infringement. The decision in the case of machines turns on the question whether the principle of the two machines is the same.³⁰

Where the patent covers a manufacture, it is an infringement to use substantially the same manufacture, however made; but, if the patent only covers a

²³ Acts of Congr. Feb. 3, 1831, §§ 6, 7; March 3, 1865, § 1.

²⁴ Act of August 18, 1856.

²⁵ *Atwill v. Ferrett*, 2 Blatchf. C. C. 48.

²⁶ *Beyond*, 3758-3789.

²⁷ Act of February 3, 1831, § 10. This statute merely supplies a remedy to enforce a right which exists at common law independently of the statute. *Little v. Hall*, 18 How. 170; *Bartlette v. Crittenden*, 4 McLean, C. C. 301; 5 *id.* 36; *Woolsey v. Judd*, 4 Du. N. Y. 385; *Wheaton v. Peters*, 8 Pet. 657. The statute operates in favor of a resident of the United States who has purchased an unprinted drama from a non-resident author, but gives no redress for an unauthorized theatrical representation. *Keene v. Wheatley*, 9 Am. Law Reg. 45.

²⁸ *Before*, 525-549.

²⁹ *Boyd v. Brown*, 3 McLean, C. C. 295; *Goodyear v. R. R.* 2 Wall. C. C. 356; *Boyd v. McAlpin*, 3 McLean, C. C. 427.

³⁰ Questions as to infringement of machines are among the most difficult metaphysics of the law. For a full discussion see *Curtis*, Pat. ch. 8; *Whittemore v. Cutter*, 1 Gall. C. C. 478; *Wyeth v. Stone*, 1 Stor. C. C. 273; *McCormick v. Seymour*, 2 Blatchf. C. C. 240.

particular method of making it, other persons can use the manufacture if made in another way. Where a person has invented a mode of carrying into effect a law of nature, and shows some particular method of doing it, his patent really covers all methods; the subject of the patent is the application of the law, however made.

2323. The owner of the patent can have a verdict for the actual damages he has sustained, and the court may render judgment for three times the amount of the verdict.³¹ The plaintiff must introduce some evidence,³² such as the selling price of the machines or amount of license fees, to show the actual damages, and the jury are then to assess the damages. No general rule of damages can be laid down. Where the patentee has established a fee for licenses, the amount of license fees he has lost by the infringement is the damage sustained. The profit made by the infringer may be the amount, but this would not include the whole profit on a machine, only a part of which was covered by the patent. But the profits of the infringer become the criterion only where no other rule can be found.³³ The payment of damages by the infringer does not authorize him to continue the use of the article.³⁴

2324. An action to recover damages for infringement is brought in the name of the party interested, whether as patentee, assignee, or grantee of the exclusive right in a certain district.³⁵ The defendant may show in defence that the invention is not patentable under the statute, that it is not new, but was used before the alleged invention, that it is not useful, or that the specification is not valid. The novelty of the invention is the point most frequently contested, and this is one of the points covered by the statute of which the defendant must give thirty days' notice. He must state "the names and places of residence of those whom he intends to prove to have possessed a prior knowledge of the thing, and where the same had been used."³⁶ He may show that the inventor abandoned the invention to the public by allowing its public use before his patent. The jurisdiction over action for infringement is vested in the United States Circuit Courts. The most efficacious remedy for infringement is by a suit in equity, which is treated further on.³⁷

2325. The owner of personal property may be injured by the deceit of another, whether the personal chattels be in possession or not in possession, corporeal or intangible.

Deceit is a fraudulent misrepresentation or contrivance, by which one man deceives another, who has no means of detecting the fraud, to the injury and damage of the latter. If this definition be analyzed, it will be found, 1, there must be a fraudulent misrepresentation; 2, inability in the person injured to prevent the fraud; 3, a damage must have ensued. These subjects will be examined successively, and afterward will be considered the remedy for the injury.

2326. From the very terms of the definition of deceit it appears there must be *fraud*, or the intention to deceive, for this is the very essence of this injury. If the party making the representation was himself mistaken, no degree of blame can be imputed to him, and, in that case, the principal feature in almost every injury, namely, a default, in a greater or lesser degree, on the side of the defendant, would be wanting.³⁸ In general, the representation must be *malò*

³¹ Act of 1836, § 11.

³² *City of New York v. Ransom*, 23 How. 487.

³³ *Seymour v. McCormick*, 16 How. 480; *Dean v. Mason*, 20 How. 198; *Suffolk Co. v. Hayden*, 3 Wall. 315; *Pitts v. Hall*, 2 Blatchf. C. C. 229.

³⁴ *Jones v. Moorehead*, 1 Wall. 155.

³⁵ Act of 1836, § 14; *Wilson v. Rousseau*, 4 How. 646.

³⁶ Act of 1836, sec. 15.

³⁷ *Beyond*, 3785-3789.

³⁸ *Pettigrew v. Chellis*, 41 N. H. 95; *Wootten v. Callahan*, 26 Ga. 366; *Mason v. Chapell*, 15 Gratt. Va. 572.

animo; but whether the party making it is himself to gain by it is wholly immaterial,³⁹ nor is it necessary that the intent should be to defraud him to whom such false and fraudulent misrepresentation is made.⁴⁰ And when such a false representation is made, the party making it will not be shielded from responsibility by adding that he gives the information without prejudice to himself.⁴¹

2327. Deceit may not only be by asserting a falsehood deliberately to the injury of another; as, that Paul is in flourishing circumstances, whereas he is in truth insolvent; that Peter is an honest man, when he knew him to be a rogue; that property real or personal possesses certain qualities, or belongs to the vendor, whereas he knew these things to be false; but by any act or demeanor which would naturally impress the mind of a careful man with a certain belief.⁴²

Therefore, if one whose manufactures are of a superior quality distinguishes them by a particular mark, which facts are known to Peter, and Paul counterfeits this mark, and affixes it to manufactures of the same description, but not made by such person, and sells them to Peter as goods of such manufacture, this is a deceit.

2328. In many cases the deceit or misrepresentation takes place in contracts, but though in some measure connected with contracts, yet the injury arises from such deceit, for it is that which has caused a damage to the party injured.

2329. This kind of misrepresentation may be expressed; as, where a person assuming to accept a bill for another represents that he is authorized so to do, and the holder in consequence retains the bill, sues the supposed acceptor, and is nonsuited and obliged to pay the costs, he may afterward sue the pretended agent for the amount of the bill and the costs, though the jury negative the fraud.⁴³ Again, when a person deceitfully asserts that the property of another is sound, and encourages the plaintiff to buy it, it is a deceit.⁴⁴ So a seller is liable in an action for a deceit for false representations as to the title and quality of a chattel sold by him.⁴⁵ The false representation of a person as a man of credit, when intentional, renders the party representing guilty of deceit, and he will be liable for the loss, when in consequence of it the plaintiff has trusted such person, and has not been able to recover from him, on account of his insolvency.⁴⁶ But where the person making the representation is honestly mistaken there is no deceit.⁴⁷

2330. Misrepresentations arising out of contracts may also be implied; as, where the vendor has a knowledge of the defects of a commodity which cannot be obvious to the buyer, and does not disclose it, or, if apparent, uses some artifice to conceal it, he becomes guilty of a fraudulent misrepresentation, for there is an implied condition in every contract that the parties to it act upon equal terms, and the seller is presumed to have assured or represented to the purchaser that he is not aware of any secret deficiencies by which the commodity is impaired, and that he has no advantage which the purchaser himself does not possess.⁴⁸

³⁹ *Pasley v. Freeman*, 3 Term, 51.

⁴¹ *Eyre v. Dunsford*, 1 East, 318.

⁴² 3 Barnew. & Ad. 114.

⁴³ *Setzar v. Wilson*, 4 Ired. No. C. 501; *Stevens v. Fuller*, 8 N. H. 463.

⁴⁴ See *Rumsay v. Lowell*, Anth. N. Y. 17; *Tryon v. Whitemarsh*, 1 Metc. Mass. 1. It is held that such a representation is within the statute of frauds and must be in writing. *Kimball v. Comstock*, 14 Gray, Mass. 508.

⁴⁵ *Haycraft v. Creasy*, 2 East, 92.

⁴⁶ See *Stevens v. Fuller*, 8 N. H. 463; *Hart v. Tallmadge*, 2 Day, Conn. 382; *Brown v. Gray*, 6 Jones, No. C. 103; *Patterson v. Kirkland*, 34 Miss. 423; *Wheeler v. Wheelock*, 34 Vt. 553.

⁴⁰ *Boyd v. Browne*, 6 Penn. St. 310.

⁴¹ *Hart v. Tallmadge*, 2 Day, Conn. 382.

⁴² *Irwin v. Skerrill*, 1 Tayl. No. C. 1.

2331. It is not sufficient that the plaintiff should be unaware of the misrepresentation. He must have no means of detecting the fraud, for if he has such means, his ignorance will not avail him; in that case he becomes the willing dupe of the other's artifice, and *volenti non fit injuria*. The law lends its aid to him who has used ordinary vigilance and discretion, and when, notwithstanding these, he has been deceived, *vigilantibus et non dormientibus serviunt leges*. When he has used all those precautions which a prudent man would have adopted in the same situation, he has then, but not till then, used all the means of detecting the deceit. If, for example, a man should sell a piece of cloth, asserting that it contained so many yards, and it contained less, the buyer could not complain of the deceit, because he could have measured it himself and been satisfied of the falsehood of the assertion.⁴⁹ And if a horse wanting an eye is sold, and the defect is visible to a common observer, the purchaser cannot be said to be deceived, although sold as a sound horse, for by inspection he might discover it; but if the blindness is discoverable only by one experienced in such diseases, and the buyer is an inexperienced person, it is a deceit, provided the seller knew of the defect.

2332. It is plain that although there may have been a deceit, if no damage has been sustained by the plaintiff he cannot recover a compensation for such damages.⁵⁰ If, therefore, a person should deceitfully represent that A is worthy of credit when in fact he was insolvent, and B sold him goods on a credit of six months, and before the money became due A should become wealthy and then pay the debt, B would have no right to sue the person who recommended A, because he had not been damaged.

Nor is there any liability unless the damage was caused by the deceit; thus a party injured by making a contract has no remedy for deceitful representations unless they induced or influenced him to enter into the contract.⁵¹

2333. The remedy for a deceit, unless the cause of action has been suspended or discharged, is by an action of trespass on the case. The injury did not arise *ex contractu*, therefore assumpsit does not lie, and as no force was used, trespass cannot be maintained.

2334. There are three classes of cases where *injuries* arise from neglect of duty. These relate to ministerial officers, common carriers, and innkeepers.

2335. A ministerial officer may be guilty of neglect to perform his duty in two ways: by permitting a prisoner to escape, and by a neglect to execute or return his writ.

2336. An escape is the deliverance of a person out of prison who is lawfully imprisoned before such person is entitled to such deliverance by law.⁵² This may be *actual*, as where a prisoner in fact gets out of prison and regains his liberty, or it may be *constructive*.

A *constructive escape* takes place when the officer gives the prisoner any liberty not authorized by law. The following cases are examples of such escapes: When a man marries his prisoner;⁵³ or if an underkeeper be taken in execution and delivered at the prison, and neither the sheriff nor any authorized person

⁴⁹ Poph. 143. See *Moore v. Surbeville*, 2 Bibb, Ky. 602; 12 East, 682; 4 Taunt. 779; *Farrar v. Alston*, 1 Dev. No. C. 69; *Bell v. Byerson*, 11 Iowa, 233; *Lawson v. Baer*, 7 Jones, No. C. 461; *Veasey v. Doton*, 3 All. Mass. 380; 1 Rolle, Abr. 101; *Davis v. Meeker*, 6 Johns. N. Y. 354; *Story, Sales*, §§ 165-168; *Starr v. Bennett*, 5 Hill, N. Y. 303.

⁵⁰ *Ide v. Gray*, 11 Vt. 615; *Monroe v. Gardner*, 3 Brev. So. C. 31; 1 Dev. No. C. 69; *Tryon v. Whitmarsh*, 1 Metc. Mass. 1; *Fisher v. Brown*, 1 Tyl. Vt. 405; *Fuller v. Hodgdon*, 25 Me. 243; *Castleman v. Griffin*, 13 Wisc. 535.

⁵¹ *Courtney v. Carr*, 11 Iowa, 295.

⁵² *Colby v. Sampson*, 5 Mass. 310; *Lowry v. Barney*, 2 D. Chipm. Vt. 11; *Patten v. Halstead*, Coxe, N. J. 277.

⁵³ *Bacon, Abr. Escape*, B. 3; *Plowd.* 17.

be there to receive him;⁵⁴ and where the keeper of the prison made one of the prisoners confined for debt a turnkey and trusted him with the keys, it was held to be an escape.⁵⁵ But the jailer may well employ the prisoner within the jail, giving him no liberty, and it is held not to be an escape where the prisoner was entrusted with the inner keys, but always under the supervision of the jailer.⁵⁶ And, in general, a constructive escape will take place only where the prisoner is entrusted with such liberty that he can at his own desire obtain full freedom, but from the want of such desire remains voluntarily within the walls of the jail or other place of confinement.

2337. Escapes are also voluntary or negligent: a voluntary escape arises from the free act of the jailer; a negligent escape from his negligence or carelessness.

A *voluntary escape* is the giving to a prisoner, voluntarily, any liberty not authorized by law.⁵⁷ Letting a prisoner, lawfully confined under final process, out of prison for any, even the shortest, time, is an escape although he afterward returns;⁵⁸ and this may be the case; as, when he is imprisoned under a *capias ad satisfaciendum*, although the officer may accompany him,⁵⁹ unless it be to remove him to a place appointed by law for his being kept, or in obedience to a writ of *habeas corpus*. But if, in the latter case, he went out of the direct road to accommodate the prisoner, it is an escape.⁶⁰ When the deviation is to accommodate the plaintiff, the sheriff is not responsible, although the prisoner escapes through his negligence.⁶¹

A *negligent escape* takes place when the prisoner goes at large, unlawfully, either because the building or prison in which he is confined is too weak to hold him, or because the keeper, by carelessness, lets him go out of prison.

And nothing will excuse the jailer where an escape takes place except the act of God, or of the enemies of the country,⁶² or the authority of a court of competent jurisdiction.⁶³

2338. The jailer is liable for the escape of prisoners lawfully in arrest, and if the arrest is illegal, he is free from all liability. He may, therefore, in his defence show that the court issuing the process had no jurisdiction,⁶⁴ or that the process was void.⁶⁵ So where a copy of process was left with the jailer as his warrant, he may justify an escape by showing such copy to be on its face void; he is not bound to look beyond the copy, and the validity of the process itself is not material.⁶⁶

But no advantage can be taken of errors and irregularities in the process which do not render it void.⁶⁷ And where the defendant was privileged from

⁵⁴ Colby v. Sampson, 5 Mass. 310.

⁵⁵ Wilkes v. Slaughter, 3 Hawks, No. C. 211; Skinner v. White, 9 N. H. 204; Steere v. Field, 2 Mas. C. C. 486.

⁵⁶ Bolton v. Cummings, 25 Conn. 410.

⁵⁷ Colby v. Sampson, 5 Mass. 310; Lowry v. Barney, 2 D. Chipm. Vt. 11; Jones v. The State, 3 Harr. & J. Md. 559; 2 Harr. & G. Md. 106.

⁵⁸ 1 Rolle, Abr. 806.

⁵⁹ Dy. 207, pl. 24; Benton v. Sutton, 1 Bos. & P. 24; Hob. 202.

⁶⁰ 1 Mod. 116; Wood v. Turner, 10 Johns. N. Y. 420; see Hassam v. Griffin, 18 Johns. N. Y. 48.

⁶¹ The State v. Woods, 7 Mo. 536.

⁶² Fairchild v. Case, 24 Wend. N. Y. 281; Baxter v. Taber, 4 Mass. 361.

⁶³ Bender v. Graham, 1 Ala. 269; Stevenson v. Carothers, 3 Yeates, Penn. 180; Wiles v. Brown, 3 Barb. N. Y. 37.

⁶⁴ Albee v. Ward, 8 Mass. 79.

⁶⁵ Howard v. Crawford, 15 Ga. 423; Hitchcock v. Baker, 2 All. Mass. 431; Tuttle v. Wilson, 24 Ill. 553.

⁶⁶ Kidder v. Barker, 18 Vt. 454.

⁶⁷ Spafford v. Goodell, 3 McLean, C. C. 97; Parker v. Hotchkiss, 25 Conn. 321.

arrest, such privilege is personal to him and affords no justification to the sheriff.⁶⁸

2339. If a prisoner confined on final process effect a negligent escape, he may be again retaken by the sheriff, but not so after a voluntary escape.⁶⁹ If he was confined on mesne process, he may be arrested by the sheriff after a voluntary escape.⁷⁰ But the plaintiff may always retake the escaped defendant, whether his escape be negligent or voluntary. He has two remedies, one against the sheriff for suffering the escape, and the other by the recapture of the prisoner. If he elect the latter and retake the prisoner, he cannot afterwards proceed against the sheriff.⁷¹ But the return of a prisoner after a voluntary escape will not discharge the sheriff.

2340. As the escape of the prisoner is a tort on the part of the sheriff, he becomes liable to the plaintiff. This action is clearly in tort and was such at common law, but by two ancient statutes,⁷² an action of debt is given against the sheriff the amount of the judgment. And as in an action of debt the whole or nothing must be recovered, there is in this case no question as to the amount of damages.⁷³ These statutes have been superseded by statutes in the various states, and the action of debt for an escape is not now in use, at least to any extent.

2341. The usual *remedy for an escape* is by an action on the case against the jailer. In this action the plaintiff can recover only the actual damage he has sustained, and this depends upon the pecuniary ability of the defendant to pay the debt.⁷⁴ The officer may therefore show that the prisoner was totally insolvent at the time of the arrest, in which case only nominal damages can be recovered, or may show his poverty in reduction of damages.

In general, the plaintiff is entitled *prima facie* to recover the amount of the judgment.

If a defendant arrested on mesne process escapes, the sheriff may show in defence that the plaintiff could not recover in the original action.⁷⁵

2342. An officer is bound to make diligent search for the defendant when he has a process against him, or for his property when he is commanded by a lawful writ to seize it, and any neglect upon his part will make him liable to the plaintiff for any loss he may sustain on that account,⁷⁶ although he may have acted from a mistaken idea that he had no authority; as, where the sheriff suspends proceedings on the production of an insolvent's discharge by the defendant, he incurs the peril of an action if the discharge turns out to be void.⁷⁷

For the same reason that he is liable when he does not execute the writ the officer is responsible for an insufficient or defective execution; as, where he was required to make a levy upon real estate, and he did it so defectively that no title passed by it, he was held liable to an action for nominal damages, notwithstanding he showed that the debtor at the time had no valid title to the land.⁷⁸

⁶⁸ Gill v. Miner, 13 Ohio, St. 182.

⁶⁹ Butler v. Washburn, 24 N. H. 251.

⁷⁰ Cady v. Huntington, 1 N. H. 138; Stone v. Woods, 5 Johns. N. Y. 182; Whithead v. Keyes, 1 All. Mass. 350.

⁷¹ Basset v. Salter, 2 Mod. 136; Ethevick v. Brewell, Comb. 396.

⁷² Stat. of Westminster, 2 Ch. 11, 13 Edw. 1; Stat. 1 Rich. II, Ch. 12.

⁷³ Steere v. Field, 2 Mas. C. C. 486.

⁷⁴ Rawson v. Dole, 2 Johns. N. Y. 454.

⁷⁵ Riggs v. Thatcher, 1 Me. 68.

⁷⁶ Dunlap v. Berry, 5 Ill. 327; Ware v. Fowler, 24 Me. 183; Palmer v. Gallup, 12 Conn. 555; Tucker v. Bradley, 15 Conn. 46.

⁷⁷ Orange County Bank v. Dubois, 21 Wend. N. Y. 351.

⁷⁸ Bell v. Roberts, 15 Vt. 741.

If the plaintiff sustain any damage in consequence of the sheriff's neglect to return his writ in due time, or within the period prescribed by the law of the place, an action will lie for such damage. In some states the sheriff is required to make his return within a certain time after the return day, and on failure to do so he is held responsible for the debt. He is also liable to the plaintiff for making a false return.

2343. As to actions founded upon neglect or non-performance of their obligations by *common carriers*, it will be convenient to consider who are common carriers, as to responsibility; what persons and goods they are bound to take; the responsibility as affected by the carrier's ability and tender of payment for his services; and failure on his part to perform his obligations after undertaking to do so.

2344. We have seen under a former title⁷⁹ who is a common carrier. It is only required here to observe that the superior alone is in general considered as the servant of the public; but to this there is an exception, the master of a vessel being viewed in the light of a principal.⁸⁰ The ship owners are not, however, discharged from liability on this account, this claim upon the captain being merely a cumulative remedy.⁸¹

2345. A common carrier fills a public station, and he is bound to discharge his duty, by administering equally and without discrimination to the necessities of each individual member of the community, so that his refusal or neglect is a breach of duty, and when this refusal is attended with inconvenience to the customer he must compensate him for the loss, unless he has a lawful excuse for the refusal or neglect.⁸²

2346. In general, the time when the goods are to be delivered to him is about the period he sets out on his accustomed journey. A land carrier may refuse to admit goods into his yard or warehouse before he is ready to take his journey, because that would increase his responsibility, unless, indeed, where there is an express undertaking, or there is a mode of dealing to receive packages at all times. Nor is a master of a vessel bound to receive goods sent to be laden at unreasonable hours.⁸³ But, in either case, if the goods are accepted, the carrier's responsibility as to them attaches.

2347. To render the carrier liable for neglect he must have the means of conveying the property; if his conveyance, be it a carriage, wagon, vessel, or steamboat, is already full, he cannot be obliged to take more; but although he may have room, he is not bound to carry merchandise until the freight, or fare, has been tendered or paid to him.

2348. Having accepted goods to carry, the carrier is responsible for the neglect of them, when an injury occurs to them, whether he has received payment of his hire or not. But if the goods were never given in charge to the carrier, as, if the owner puts them in the care of a servant, and sends him to have the sole charge of them,⁸⁴ the carrier is not responsible.

The carrier is bound to deliver goods to the persons to whom they are consigned, and when he delivers them to a person not entitled to them he does so at his peril.

2349. In considering the obligations and rights of innkeepers the subject of their liability was so fully examined that we shall not be required here to do more than to refer to it.⁸⁵

⁷⁹ Before, 1020.

⁸⁰ *Morse v. Slue*, 190, 238; *T. Raym.* 220.

⁸¹ *Boson v. Sanford*, 3 *Lev.* 258.

⁸² *Bacon, Abr. Carriers*, B; 1 *Saund.* 312, c; *Riley v. Horne*, 5 *Bingh.* 217.

⁸³ *Lane v. Cotton*, 1 *Ld. Raym.* 652.

⁸⁴ *East India Co. v. Pullen, Strange*, 690.

⁸⁵ Before, 1016.

CHAPTER VI.

INJURIES TO REAL PROPERTY IN POSSESSION.

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2350. *Injuries to real property* affect the rights of the party in possession, or they affect the rights of the reversioner or remainder-man who is not in possession. The first of these classes will be considered in this chapter.

2351. *The injuries which affect the possession* or right of possession may deprive the owner of the possession, as ouster, or may merely injure him in this possession without depriving him of it. If this last injury is done with force, it is a trespass; if without force, a nuisance.

2352. *Ouster* is the actual turning out, or keeping excluded, the party entitled to possession of any real property corporeal. And such an ouster or dispossession may be either of the freehold or of chattels real, but it cannot be committed of anything movable.¹ An ouster may be committed by a stranger, or by one tenant in common. A taking possession by one tenant of the whole property with an actual intent to exclude his co-tenant from the enjoyment is an ouster as much as if committed by a stranger.²

¹ Doe v. Cowley, 1 Carr. & P. 123; 3 Sharswood, Blackst. Comm. 167.

² Newell v. Woodruff, 30 Conn. 492; Izard v. Bodine, 3 Stockt. N. J. 403.

Ousters of the freehold may be effected by one of the following methods: abatement; intrusion; disseisin; discontinuance; and forfeiture.

2353. *Abatement*, in this sense, as an injury to real estate, is where a person dies seised of an inheritance, and before the heir or devisee enters, a stranger who has no right makes entry, and gets possession of the freehold; this wrongful entry is called an abatement, and the person who makes it an abator.³ This is one of the highest injuries which can be committed against the right of real property.

2354. *Intrusion* takes place when, after the determination of a particular estate of freehold, a stranger enters wrongfully before the remainder-man or reversioner; for example, when a tenant for life dies seised of certain lands, and after such death of the tenant for life, a stranger enters before the remainder-man or reversioner.⁴ Intrusion differs from abatement only in this, that the former is an injury to the remainder-man or reversioner, and the latter to the heir or devisee. The person who makes an intrusion is an intruder.

2355. *Disseisin* is a wrongful putting out of him who is seised of the freehold.⁵ To make a disseisin there must be a claim or color of title at the commencement, for any other entry is a mere trespass. To constitute a disseisin there must be an intention to obtain an adverse possession, and unless that be manifest the wrongful act cannot put him out who is seised of the freehold.

2356. By adverse possession is meant the enjoyment of land, or such estate as lies in grant, under such circumstances as indicate that such enjoyment has been commenced and continued under an assertion of right on the part of the possessor.⁶

When a wrongful entry is made by one claiming title, the rightful owner of the land may consider him as a disseisor of his whole interest, although such a wrong doer may claim a less estate, because a disseisor cannot qualify his own wrong, so as to prevent the owner from pursuing the remedies which the law has provided in cases of disseisin, and which are more specific and effectual than those applicable to a mere trespass.

The person who makes a disseisin is called a disseisor.

2357. The fourth kind of ouster is a *discontinuance*, which is an alienation made or suffered by the tenant in tail, or other tenant seised in *auter droit*, by which the issue in tail, or heir or successor, or those in reversion or remainder, are driven to their action and cannot enter; as, if tenant in tail makes a feoffment in fee simple, or for the life of the feoffee, or in tail, all which are beyond his power to make, for that, by the common law, extends no further than to make a lease for his own life; in such case the entry of the feoffee is lawful during the life of the feoffor, but if he retains possession after the life of the feoffor, it is an injury, which is termed a discontinuance.⁷

2358. The last species of injuries by ouster is called a *deforcement*. In its most extensive sense it signifies the wrongful holding of any lands or tenements to which another person has a right,⁸ so that it includes as well an abatement, an intrusion, a disseisin, or a discontinuance, as any other species of wrong

³ By the ancient laws of Normandy the term abatement was used to signify the act of one who, having the apparent right of possession of an estate, took possession immediately after the death of the actual possessor, before the heir entered. *Hollard, Anciennes Loix des Français*, tome i. p. 539.

⁴ *Coke*, Litt. 277; *Fitzherbert*, Nat. Brev. 203; *Archbold*, Civ. Pl. 12; *Dane*, Abr.

⁵ *Coke*, Litt. 277; *Taylor v. Horde*, 1 Burr. 110; Litt. sec. 279.

⁶ *Campbell v. Wilson*, 3 East, 294; *Morris' Lessee v. Vanderen*, 1 Dall. 67; *Watson v. Gregg*, 10 Watts, Penn. 289; *Jones v. Porter*, 3 Penn. 132; *Jackson v. Huntingdon*, 5 Pet. 402; *Rung v. Shoneberger*, 2 Watts, Penn. 23.

⁷ 3 *Sharswood*, Blackst. Comm. 172.

⁸ *Coke*, Litt. 277.

whatsoever by which the owner of the freehold is kept out of possession. But as contradistinguished from the former, it is only such a detainer of the freehold from him who has the right of property as falls within none of the injuries above mentioned.⁹ These distinctions are not generally regarded in this country; whenever a man is unlawfully kept out of the possession of lands to which he has a title, it is called a disseisin or an ouster.

2359. It must be remembered that both the entry and the detention are unlawful in the cases of abatement, intrusion, and disseisin; in these cases the rightful owner of land has the right to make a re-entry, because, having been in possession, he regains that which has been wrongfully taken from him. But in a discontinuance and deforcement, not having been in possession, the lawful owner of the land cannot make such a re-entry; in these latter cases he is driven to his legal remedy.

2360. When a re-entry is made, the owner of the land must, of course, be careful not to violate the law, for the law will never justify a man in doing an act by which he must violate its peaceful precepts. At the time of making such entry he should declare, in the presence of witnesses, that he thereby takes possession, and he will then be reinstated in his right and become reseiased. If he should be deterred from making an entry by menaces or bodily fear, he may make a claim as near to the land as he can with like forms and solemnities. As this claim will be in force only for a year and a day, he must, before that time expires, repeat the claim, and so for all succeeding time once every year and day. This is called a continual claim; it has the same effect as a legal entry.

2361. This right may be barred, defeated, taken away, or tolled by descent; as, when one seised by any means whatever of a corporeal hereditament dies, by which it descends to his heirs; then, however feeble the right of the ancestor might have been, the right of entry of any other person who claims right to the freehold is taken away, and he cannot recover possession of the heir by this summary method, but is driven to his action to recover the legal seisin of the estate. The heir of the disseisor has the right to the possession, and the disseisee the right to the estate. This is the general rule, unless the owner of the land is laboring under some disability, such as coverture, infancy, insanity, and the like.¹⁰

Land, and the possession of it, may also be recovered by action. This mode of recovery will be considered when we come to treat of actions.

2362. The consideration of *trespass to real estate* will lead us to inquire into the nature of the estate, the title of the plaintiff, the nature of the injury, and the justification of trespass on land.

2363. By trespass to real estate is meant the several acts of breaking through an inclosure, and coming into contact with any corporeal hereditament, of which another is proprietor and in possession, without lawful authority, by which a damage has ensued.

Injuries by trespasses are upon the land, or in the house of the party in actual possession, and without eviction, which distinguishes a mere trespass from an ouster. It must be an interest in the realty, something tangible; it may be an estate in fee, for life, or for years, or it may be an injury to the vesture—in short, any thing at once palpable and immovable expressed by the term corporeal hereditament.

The law encircles every man's land with an ideal imaginary fence, and the act of a stranger unlawfully breaking through it is injurious. Where an ac-

⁹ 3 Sharswood, Blackst. Comm. 173; Archbold, Civ. Pl. 13; Dane, Abr.

¹⁰ This doctrine of the effect of descent in tolling the right of entry is generally abrogated in this country either by statute or by the decisions of the courts.

tual, substantial boundary has been removed, the law instantly raises up an ideal one; and it is for this reason that if a man finding another's door open unlawfully enters into the house, he is said to break into it.¹¹ To ascertain in any case whether the law surrounds a particular description of property with an inclosure, we have only to consider whether the owner may encircle his estate with a substantial visible fence.

2364. The *bare possession* or *occupancy* is a sufficient title to maintain trespass against all the world, except the proprietor himself.¹² Where the plaintiff has a quiet and peaceable possession, though he came to it tortiously, his title is sufficient against a stranger.¹³

On the contrary, a good title without possession is insufficient to maintain trespass unless the owner was in possession at the time when the trespass was committed, for the gist of the action is the injury to the possession. A trespass cannot be committed against the reversioner, because he is not in possession, but against the tenant, who has no other title than the possession.

To maintain trespass the owner must first possess himself of the soil by an entry on it. But having once entered, he has, in contemplation of law, been in possession from the moment his title first accrued. For example, an heir from the death of the ancestor, a devisee from the decease of the deviser, a personal representative from the death of the testator or intestate, and a purchaser from the conclusion of the contract.

When the possession has been once acquired and it has been interrupted for a time, it must be regained before the owner of the land can punish a trespass committed after his right of repossession accrued. The following case exemplifies this rule: If A leases land for years, and after the determination of the term B enters upon it, before A can demand reparation of this injury, A must have repossessed himself of the property.¹⁴ But having done so, he is considered in possession by relation back, as in the cases just mentioned, and immediately after his re-entry he is accounted as having been in possession from the time at which his tenant's interest expired.¹⁵

The entry which thus restores the right of the plaintiff may be made upon a part of the land in the name of the whole,¹⁶ and made either in person or by attorney. If a stranger enters of his own accord for the benefit of the owner, and afterward the owner recognizes the act, this makes the stranger attorney *ab initio*.

Where several persons are jointly interested in the possession as joint tenants or tenants in common, an entry by one inures to the benefit of all.¹⁷

2365. It has already been stated that the act of breaking an inclosure is injurious to the proprietor, but it must be understood with this limitation, that it is only where his occupation is thereby more or less incommoded. The ideal fence, of which mention has been made, extends upward *usque ad cælum*, and downward as far as his property descends, where a man is owner of the surface, and therefore breaking this ideal fence either upward or downward is in law a trespass; but such a trespass does not always entitle the owner to an action, because sometimes he receives no injury. For example, if a man flies a hawk across the land of another, or passes through the air in a balloon over a man's

¹¹ 11 Hen. IV, Trin. 16, p. 75. See *Gilmore v. Wale*, Anth. N. Y. 64.

¹² *Townsend v. Kerns*, 2 Watts, Penn. 180; *Barstow v. Sprague*, 40 N. H. 27.

¹³ See *Cutts v. Spring*, 15 Mass. 135.

¹⁴ *Bigelow v. Jones*, 10 Pick. Mass. 161; *Allen v. Thayer*, 17 Mass. 299; *Blood v. Wood*, 1 Metc. Mass. 528.

¹⁵ *Tyler v. Smith*, 8 Metc. Mass. 599.

¹⁶ *Cotton's Case*, Croke, Eliz. 189.

¹⁷ *Smales v. Dale*, Hob. 120.

farm, he does no injury, and probably the owner of the land could not recover even nominal damages; but should such a person let something fall out of his balloon, or should his bird drop down dead on the land below, he could not lawfully enter to get what had so fallen in order to remove it, and this shows that the act is not justifiable.¹⁸

The act complained of must be upon or at least in contact with the land or building, or it cannot be deemed a trespass, but merely a nuisance, and must have been an act committed, or caused to have been committed, by the defendant.

2366. It must be some act done, so that it might be described as committed with force, for a mere nonfeasance is not a trespass. Indeed, it is questionable whether the mere continuance of any injury, for the inception of which the plaintiff has already recovered damages, can be treated as a trespass; as, for example, the neglect to remove an incumbrance on land, after a verdict for placing it thereon. But a tenant at will becomes a trespasser by an unreasonable delay in moving away from the premises after his estate is determined.¹⁹

2367. Every man is liable not only for his own acts, but also for those of his authorized agent in the particular transaction, when done at his request. He is also liable for the trespasses committed by his cattle, whose habit of wandering must be known or presumed to be known to him, although without his concurrence; it would be otherwise as respects other animals, as a dog.²⁰ But the owner of such animal will not be liable for the trespass where the land was not fenced according to law, or where its owner was to blame in relation to such a trespass.

2368. A man may *justify* or excuse an entry into the lands of another, either because he is authorized by law, or because he has a license or authority from the owner, expressed or implied.

2369. When the law commands one of its officers to do a thing he is justified for so doing, while obeying the writ, precept, or warrant by which he is commanded so to do; and whether the warrant be founded on a valid judgment or not is of no consequence to him, he is not to look beyond the words of the writ; but this must be understood with this qualification, that the court or magistrate who issued such a writ had jurisdiction of the case, for, unless they had, not only the officer, but the court or magistrate, will be trespassers.

An officer may enter the close of another, against whose person or property he is charged with the execution of a writ, and if obstacles are opposed to his progress he may throw them down. His authority in the execution of his writ is different, as the process is of a civil or criminal nature. In the former case the officer is not justified in opening, even by unlatching the outer inlet to a house, as a door or window opening into the street,²¹ although it has been closed for the very purpose of excluding him;²² the reason assigned for this rule is that otherwise the family within doors would be left naked and exposed to robbers from without.²³ But this privilege is qualified by the circumstance that the party whose arrest is desired has not escaped from the officer, for when he has so escaped, he is guilty of wrong which authorizes the breaking of an outer door to retake him.²⁴

¹⁸ 2 Rolle, Abr. 567, L, pl. 1; beyond, **3588**, note.

¹⁹ *Ellis v. Paige*, 1 Pick. Mass. 47; *Rising v. Stannard*, 17 Mass. 282.

²⁰ 1 Carr. & P. 1119. In Louisiana, under certain circumstances, the owner of a slave, or of an animal, may discharge himself from responsibility for the trespass by abandoning the slave or animal. La. Civ. Code, Art. 180, 181, 2301.

²¹ *F. Moore*, 917, p. 668; *Cooke's Case*, W. Jones, 429.

²² *Seyman v. Gresham*, Croke, Eliz. 908.

²³ *Lee v. Gansel*, Cowp. 1. See, as to the extent of the privilege, *Penton v. Brown*, 1 Kebl. 698.

²⁴ 7 Mod. 8; *Palm*, 54; *Genner v. Sparks*, 1 Salk. 9.

This privilege protecting the outer inlet from being broken in a civil case is limited to the owner alone, and will not screen the person of another, who, with the owner's assent, flies to the house for protection from a civil process, nor such a stranger's goods which have so been removed into the house; but the case is otherwise when the stranger or his property are there *bona fide*, and without fraud or covin.²⁵

But in the latter case, or when the process is of a criminal nature, the officer is justified in breaking an outer door, the owner having no such privilege or immunity from invasion, because the general interest of the commonwealth requires that criminals should be arrested and the law put in force, and in this and all other cases, the convenience of a private individual must yield to the requirements of the public good.²⁶ A constable may, therefore, break open the outer door of a dwelling-house to arrest one within suspected of felony; and a sheriff may do the same thing to execute a process of a criminal nature, as for a contempt.

It must, however, be remembered that the law never sanctions acts of violence, when its commands can be enforced by the adoption of lenient measures, so that if an officer finds an outer door fastened when he is authorized to enter, he should in the first place demand that it should be opened, and, on the refusal or neglect of those within to do so in a reasonable time, he is justified in breaking it open; for if it be broken without a demand, the trespass cannot be justified unless there is danger that by the delay an affray, murder, or other crime may be committed. An officer cannot justify breaking an outer door in the night time for any other cause than treason or felony, or to prevent an affray, riot, or other crime.²⁷

When an outer door or window is open, the officer may enter through it to execute a civil writ, and, having once lawfully entered, he may in every case, when necessary, break open an inner door or force open a lodger's apartment opening to the stairs or passage.²⁸

2370. The landlord, to whom rent is lawfully due, may enter the premises to distrain, the outer door being open, but he has no right to force it; he is bound to act in every way with the same forbearance as an officer who is authorized to execute mere civil process.

2371. The owner of goods and chattels may enter the land of another upon which they are placed, and remove them, provided they are there without his default; as, where a man's tree is blown down by a storm, and fallen on the adjoining estate, or his fruit has fallen into it from a branch which overhung it;²⁹ but if the owner of the chattel be the least in fault, he cannot lawfully enter; as, in the instance of a man letting a chattel fall from his balloon while traversing the air over the land, as has already been mentioned.

The owner of cattle may enter the land of a stranger to retake them, when such cattle have gone there through the latter's default in not keeping up his fence as the law requires; but if he allows them to remain there after he has had notice, he cannot then enter; for then they are there through his default and may be distrained damage feasant.

2372. One joint tenant or tenant in common of a personal chattel, as a horse, cannot enter the close of the other to take it away, because the latter has an equal right to the possession with himself.³⁰

²⁵ *Semayne's Case*, 5 Coke, 93.

²⁶ *Burdett v. Abbott*, 14 East, 1.

²⁷ *Smith v. Smith*, Croke, Eliz. 741; *Foster v. Hill*, 1 Bulstr. 146.

²⁸ *Lee v. Gansel*, Cowp. 1.

²⁹ 20 Viner, Abr. 418.

³⁰ Godb. pl. 403, p. 282. See *Hyde v. Stone*, 7 Wend. N. Y. 354; 9 Cow. N. Y. 230; *Erwin v. Olmstead*, 7 Cow. N. Y. 229.

2373. When a duty is imposed by law on a man to perform an act and it cannot be done without entering the land of another, the person thus required will be justified in making an entry; as, for example, where a company are required to make a road or keep it in repair, they will be justified in a necessary entry on a stranger's land for that purpose, but in that case they will be required to pay him for the damage they may commit and strictly pursue the authority given to them by the legislature;³¹ or if one man is bound to repair or cleanse a dyke on the land of another, he may enter for that purpose, even though the dyke be an easement to his own land, and he may in either case do all the acts requisite to accomplish his purpose.³²

2374. A creditor has a right to enter the land of his debtor to demand a debt or duty actually due, even though such debt is not payable there, nor the duty to be performed at that place; but till it is due the creditor has no such right.

2375. Every traveller has a right to enter a common inn at all reasonable times, provided the host has sufficient room and accommodation, which, if he has not, it is for him to declare—the law requiring him to accommodate all travellers without distinction, unless the applicant has by his conduct rendered himself unfit to be taken into the house; as, where he is drunk, or is afflicted with a contagious disease.

2376. Every man may abate a public nuisance, and a private one may be thrown down by the party aggrieved, and this even before any prejudice has happened, but only from the probability that it may happen; for this purpose the abator has authority to enter the land on which it stands. For example, where A has a right to a stream of water flowing through B's land, and its course is interrupted in the land of B, A may enter and remove the obstruction; but until the nuisance has been so far completed as to create an inconvenience, it cannot be removed.

Upon the like principle, a man may destroy the property of another where the public good or his own requires it; as, where a house is on fire which may endanger a whole town, any one has a right to pull it down to stop the progress of the flames and prevent further mischief; so a man may pull down the dwelling of his neighbor on fire to prevent the destruction of his own. In these and similar cases he has a right of entry for that purpose, for the *maxim salus populi est suprema lex* applies in such cases.³³

2377. Having enumerated the various kinds of authority in law which will justify a trespass, it will be requisite now to consider what authority in fact will have the same effect.

2378. A man has the privilege of entering upon the land of another to exercise therein an incorporeal right or hereditament, to which he is entitled. Incorporeal hereditaments are distributed under two classes, namely, profits and easements. Profits, which comprehend the produce of the soil, whether it arise above or below the surface; as herbage, wood, turf, coals, minerals, stones, also fish in a pond or running water. Profits are divided into *profits à prendre*, or those taken and enjoyed by the mere act of the proprietor himself, and *profits à rendre*, or such as are realized at the hands of or rendered by another. The second class of incorporeal hereditaments is called easements. This subject having been fully considered in another place, it is not required to give it any further examination here.³⁴

³¹ *Bonaparte v. Camden & Amboy R. R. Co.*, Baldw. C. C. 231.

³² *Nicholas v. Chamberlain*, Croke, Jac. 121.

³³ 11 Coke, 13; Jacob, Inter. Max. 115; *Beach v. Trudgain*, 2 Gratt. Va. 219; see *Rector v. Buckhart*, 3 Hill, N. Y. 193; Bacon, Max. Reg. 12; Noy, Max. 36, 9th ed.; Broome, Max. 1; Dy, 36, b.

³⁴ Before, 1644.

2379. The second kind of right arising from an authority in fact is that of a license. A *license* is a right given by some competent authority to do an act which, without such authority, would be illegal. A license is express or implied, when considered as to the manner of granting it; as to its effects, it is a bare authority, without interest, or it is coupled with an interest.

First. A license is *express* where in direct terms it authorizes the performance of a certain act; as, where a man who owns a dam authorizes his neighbor to draw water from it to his mill; in this case the licensee has a right to enter the premises to get the water.

Second. An *implied* license is one which, though not expressly given, may be presumed from the acts of the party who has a right to give it. The following are examples of such licenses:

When a man knocks at another's door and it is opened, the act of opening the door licenses the former to enter the house for any lawful purpose; but if the opening of the door has been obtained for an unlawful purpose, and then violence is used to obtain an entry, the party will be a trespasser.³⁵

A servant, in consequence of his employ, is licensed to admit into the house those who come on his master's business, but only such persons; and, therefore, where the plaintiff's daughter and servant let the defendant into her master's house for the unlawful purpose of sleeping with her, his entry was illegal.³⁶ Nor has a wife a greater privilege, in this respect, than a servant,³⁷ though it may be inferred from circumstances that the master has given to the servant, and the husband to his wife, a general authority to invite whom they please to the house.

A man who keeps a store for the sale of merchandise is presumed to license all persons to enter who come there for lawful purposes; and the same presumptions will arise in all cases where a person expects or invites customers to come and deal with him, let his business be what it may.

Third. A *bare license* or authority is such as is given without consideration; as long as it remains executory, that is, until it has been carried partially or wholly into effect, it is not binding on the party conferring it, so that he may revoke it at his pleasure; but when carried into effect, either partially or altogether, it can only be rescinded, if in its nature it is capable of revocation, by placing the licensee in the same situation in which he stood before he entered on its execution.³⁸ A bare license may be oral, but if it be coupled with an interest, the formalities essential to confer such an interest should be observed.

Such a bare license must be executed by the party to whom it is given in person, and does not in general extend to others, unless, from the circumstances, it can be presumed there was an implied license to such persons; as, where a license is given to a man to remove a weighty matter which requires the assistance of several other persons.

Fourth. A license, *coupled with an interest*, is where the party obtaining a license to do a thing also acquires a right to do it; in such case the authority conferred is not merely a permission, it amounts to a grant, and it may be assigned to a third person, which a bare license cannot be.³⁹

2380. When a license is given, it is presumed the donor gives all the privileges absolutely necessary to the complete enjoyment of such an incorporeal right; and, therefore, where there was a grant of a free and convenient way

³⁵ Parke v. Evans, Hob. 62.

³⁶ Cook v. Wortham, Selwyn, Nisi P. 999.

³⁷ Taylor v. Fisher, Croke, Eliz. 246.

³⁸ Winter v. Brockwell, 8 East, 308.

³⁹ Warren v. Arthur, 2 Mod. 317; Bringloe v. Morrice, 1 Mod. 210; Crabb, Real Prop. §§ 521 to 525.

over land, for the purpose of conveying coals, the grantor was held entitled to lay a frame wagon-way upon the land, such a way being necessary to accomplish the purpose of the grant.⁴⁰ It is a rule, too, that one in the exercise of a right has authority by law to do all acts incidentally essential to its enjoyment; it follows, therefore, that if obstacles are opposed to the enjoyment of an incorporeal hereditament or a license, the licensee may remove them, occasioning the opposite party no greater detriment than is necessary or the circumstances of the case may render indispensable.

2381. When an entry has been lawfully made, and afterward the party who has made it abuses his authority, he becomes responsible for the consequences, but in a different degree, as the authority was one in law or one in fact.

When a man has lawfully entered by virtue of an authority in law, and then abuses his right, he becomes a trespasser *ab initio*, for he is then considered as having intended from the beginning to commit a trespass, and he is not looked upon as a servant of the law; as, if a constable or a sheriff, having an execution authorizing him to seize the defendant's goods, take his person; or if a landlord distrains for rent, and afterward the tenant offers all the rent in arrear and costs, but, notwithstanding, the landlord persists in his distress he will be considered as a trespasser *ab initio*.

As a general rule, whenever an officer makes an entry, and violates his duties toward a defendant, as by taking property to which he is not entitled, or before he is entitled, or in a manner not warranted by law, or does not release it after being paid the debt and costs for which he had seized it, he becomes a trespasser *ab initio*.⁴¹

It may be observed that a mere non-feasance is not such an abuse of authority as to make a man a trespasser *ab initio*, there must be a direct wrong; where several defendants entered an inn, and, having eaten and drunk, refused to pay, it was adjudged that such refusal did not make them trespassers from the beginning, or the entry into the house an act of trespass.⁴²

When the authority is derived not from the law, but the entry is made under an authority in fact, the consequences are not the same as when it is made in consequence of an authority in law. The party giving the authority by his act sanctions all other acts incidentally necessary to attain the end for which it was given; if the privilege has been abused, the defendant becomes a trespasser not *ab initio*, but for the excess only, supposing his abuse of the power be, in itself, a forcible injury.⁴³

2382. Literally the word *nuisance* means annoyance. It is anything which unlawfully works hurt, inconvenience, or damage to others.⁴⁴ Nuisances are of two kinds, namely, public and private. A public nuisance, which affects all the citizens of the commonwealth, is classed among public wrongs; a private nuisance is one which is injurious to the lands, tenements, or hereditaments of another.

⁴⁰ *Stenhouse v. Christian*, 1 Term, 560.

⁴¹ *Bond v. Wilder*, 16 Vt. 393; *Smith v. Gates*, 21 Pick. Mass. 55; *Van Brunt v. Schenck*, Anth. N. Y. 157; *Ballard v. Noaks*, 2 Ark. 45.

⁴² *Six Carpenters' Case*, 8 Coke, 290.

⁴³ *Bacon*, Abr. *Trespass*, B; *Bradley v. Davis*, 14 Me. 44; *Jarrett v. Gwathmey*, 5 Blackf. Ind. 237; *Wendell v. Johnson*, 8 N. H. 220; *Cushing v. Adams*, 18 Pick. Mass. 110.

⁴⁴ 3 *Sharswood*, Blackst. Comm. 215. It is difficult to state exactly the definition of a nuisance and the points which distinguish it from other injuries to property. As distinguished from trespass, it is to some extent an indirect injury, and most of the nuisances to real estate are accomplished without any invasion of another's property or any technical breaking of the close for which trespass *quare clausum* would lie. It is also continuous or repeated in its effects, and does not arise from an injury single and accomplished by one

For the injuries sustained from a public nuisance a private individual has no remedy unless he has received special damages,⁴⁵ the proper redress for this species of wrong being by indictment.⁴⁶ But when the nuisance is of a private nature, any one injured by it has various remedies adapted to the circumstances of the case.

To constitute a public nuisance there must be such a number of persons injured that it ceases to be a private nuisance, and whether it is in fact public or private is a question for the jury in each particular case. It is well established that an individual cannot recover damages for a public nuisance without proving special damages, but the remedy by abatement is open to him if he suffers the same damage as the rest of the public. Many important questions have arisen in regard to acts done under legislative authority, and such acts are in no case held *prima facie* to be nuisances. Some cases state broadly that no act done by such authority can be a nuisance. This of course presupposes that the legislature has not exceeded its constitutional powers. In regard especially to street railroads, the power of the legislature to grant such franchises is now unquestioned. But where the law is unconstitutional, no authority can be set up, and the act done becomes a nuisance as much as if no law existed. The presumption in favor of the constitutionality of all laws duly enacted will of course prevent the issuing of an injunction before trial. The abuse of a corporate franchise does not come within the protection of the act of incorporation, and may be a nuisance like any other unauthorized act.

Nuisances of a private nature are to corporeal or incorporeal property.

2383. *Nuisances to corporeal hereditaments* affect the habitation of man, houses, mills, or lands.

Nuisances frequently affect the habitation so as to render it uncomfortable and unwholesome; as, where one neighbor sets up and exercises an offensive trade by which the air is corrupted, or if he keeps hogs or other noisome animals, so as to render his neighbor's dwelling unwholesome. These are nuisances; for, although a man may follow such a trade and keep such animals, yet he must do so by having a proper place where he will not injure his neighbors; for the rule *sic utere tuo ut alienum non laedas* applies in such cases, and these nuisances are therefore actionable.⁴⁷

act. Thus the firing of a gun on one's own land would not constitute a nuisance, though it might if repeated day after day. A direct invasion of property constitutes a trespass, and no number of repetitions avails to deprive each act of its character as a trespass. In some cases the same act may be a trespass and cause a nuisance. Thus where one builds over his neighbor's land, this is a direct invasion of property and a trespass, but the dripping of the water is a nuisance, and is equally a nuisance whether the eaves project beyond the dividing line or not, unless some such right is given or implied. It is true that the damages for the trespass may include the indirect damages caused by the nuisance, but still the injuries are distinct. The remedy for the dripping is by trespass on the case, and this would lie equally for a single offence; but the remedies by injunction and abatement are founded on the repetition and probable continuance of the offence, and this is of the essence of a nuisance. In an action for a nuisance, the title to the property causing the nuisance is not in question, but is supposed to be in the defendant, but the gist of the injury is in the unlawful and improper use of his property. Where incorporeal hereditaments or easements are obstructed, to constitute a nuisance the injury must be equally such whether it is committed by a stranger or by the owner of the servient estate.

⁴⁵ *Lansing v. Smith*, 4 Wend. N. Y. 9; *Burrows v. Pixley*, 1 Root, Conn. 362; *Harrison v. Sterret*, 4 Harr. & McH. Md. 540; *Shaw v. Cummesky*, 7 Pick. Mass. 76; *Howell v. McCoy*, 3 Rawle, Penn. 256; *Mills v. Hall*, 9 Wend. N. Y. 315; *Pittsburgh v. Scott*, 1 Penn. St. 309.

⁴⁶ The party injured by a public nuisance may, in some cases, obtain an injunction in equity.

⁴⁷ *Croke*, Car. 510; *Bacon*, Abr. *Nuisances*, A. See *State v. Purse*, 4 M'Cord, So. C. 472.

A nuisance to a house, whether it be a dwelling or not, may be :

First, by overhanging it, which is also a kind of trespass, for, as we have seen, the owner of the surface of the earth has a right upward *usque ad coelum*, and his property is surrounded by an ideal fence, which is broken by so building as to overhang it.

Second, by stopping lights to which the owner is entitled.⁴⁸

Third, by corrupting the air with noisome smells.

Nuisances to mills and the streams connected with them commonly arise from the unlawful use of the water, by which the superior mill is overflowed with back water. This subject was fully examined when we were considering the rights of riparian owners.⁴⁹

Nuisances to land may arise in various ways ; if, for example, one erects a smelting house for lead so near the land of another that the vapor and smoke kill his corn or grass, or injure his cattle feeding on his land, this is a nuisance. And thus any lawful act done in an improper place, by which an injury arises to a third person, becomes a nuisance, because a man must do a lawful act in a proper place, and not where it will be injurious to others.⁵⁰

It is also a nuisance injurious to land so to dam water as to make it overflow that of a neighbor ; or to stop or divert water which naturally runs to another's meadow or mill ; to corrupt or poison a water course by using a dye-house, or a lime-pit, or a tannery,⁵¹ either for the use of trade or otherwise, in the upper part of the stream ; or to erect a dam in a public stream, by which the plaintiff sustains a loss.⁵² Indeed, upon the principle already cited, that every one is bound to use his own so as not to injure his neighbor, or of doing unto others as he would they should do unto him, no one is allowed to do that on his own estate which must be injurious to his neighbors without being answerable in damages for the consequences.

2384. The law looks upon a *nuisance to incorporeal hereditaments* in the same light as upon a nuisance to corporeal hereditaments. Where a man has a right of way, annexed to his estate, to pass over another man's land, and it is obstructed or stopped so as to prevent the owner of the land passing over the same, this is a nuisance.

It is to be noticed that the obstruction of an easement only becomes a nuisance when it is continuous or repeated. For a single obstruction, an action on the case will lie, but unless repeated or continuous, as, where a fence is erected across a way, it is not a nuisance.

2385. There are several *remedies* for the prevention of a nuisance, and for compensation. These are by injunctions, by abatement, and by action.

2386. In England there is a species of injury, which is frequently a nuisance, called *purpresture*. It takes place when an individual encroaches, or makes that several to himself, which ought to be common to many ;⁵³ as, if an individual were to build between high and low water mark on the side of a public river. In cases of this kind an injunction will be granted on *ex parte* affidavits to restrain such a *purpresture* and nuisance.⁵⁴

Bills to restrain public nuisances can extend only to such as are nuisances at

⁴⁸ In most of the United States, as more fully stated in another place, no easement of light can be acquired by prescription, and consequently there can be no nuisance to ancient lights, but only to such easement founded in grant. Before, 1619.

⁴⁹ Before, 1614.

⁵⁰ Bacon, *Abr. Actions on the Case*, F; 1 Rolle, *Abr.* 89; *Rex v. White*, 1 Burr. 333.

⁵¹ *Howell v. McCoy*, 3 Rawle, Penn. 256.

⁵² *Hughes v. Heiser*, 1 Binn. Penn. 463; *Alexander v. Kerr*, 2 Rawle, Penn. 83.

⁵³ Skene, *Purpresture*; Glanville, l. 9, c. 11, p. 329, note by Beame; 2 Inst. 38, 272; Spelman, *Glos. Purpresture*; Hale de Portibus Maris, Harg. Tr. 84.

⁵⁴ *Attorney Gen. v. Johnson*, 1 Wels. Ch. 87.

law.⁵⁵ And it must be remembered that nuisances which are of a criminal nature, and indictable, are not cognizable in a court of equity.

An injunction may be had to prevent a private nuisance, but every common trespass will not be considered a nuisance. Until the party fully establishes his title, the injunction will not be granted, nor in general until there has been a trial at law to establish the existence of the nuisance, when the matter complained of is not *ipso facto* a nuisance, but may be so according to circumstances, which must be found by the verdict of a jury.⁵⁶

In general, courts of equity will not enjoin when their interference would stop a large trading concern in which a capital of great amount had been embarked, because such stoppage might be very injurious until answer.

But in a plain case of nuisance the court will interfere upon affidavits, certificate, and notice, and will not suffer the nuisance to go on to the prejudice of the party in the mean time, but grant an injunction until a trial shall be had.⁵⁷

2387. The *abatement* of a nuisance is its prostration or removal by the mere act of the party injured without recourse to legal proceedings. Let us inquire who may abate a nuisance and into the manner of abating it.

2388. It has been broadly stated that any one may abate a public nuisance, but this must be taken with limitations. In the first place, no nuisance, public or private, can be abated in such a manner as to cause a breach of the peace. Any person who suffers special damage by a public nuisance, and who could have an action for damages, may abate such nuisance. And in some late cases, the remedy by abatement is confined to such cases.⁵⁸ This limitation seems, however, too narrow, and the proper rule seems to be that an individual who suffers from a public nuisance in the same manner as others who are affected by it may abate it, but this cannot be done by one who is not affected by it. Thus, for instance, a nuisance to the property in a certain district may be abated by a property holder in such district, but not by anybody else. A similar illustration may be given in regard to obstructions to highways which partially obstruct the road. Unless they render the road impassable or dangerous no action lies, and any person who passes must use ordinary care to avoid them. An injury caused by such obstruction, to which the negligence of the injured party contributes, is without remedy, and a slight inconvenience or possibility of injury is not a special damage sufficient to support an action. But yet in such a case a person lawfully using the highway may without doubt abate such nuisance. The many cases which hold that a fierce dog going at large is a common nuisance and may be killed by any one come within this rule.

2389. A private nuisance may be abated by any person who is injured by it; but this act, like other remedies without aid of the law, is to be exercised cautiously, and not in doubtful cases. A distinction is sometimes made between nuisances caused by acts of commission and acts of omission, and it is said

⁵⁵ *Barnes v. Baker*, Ambl. Ch. 158. The cases in which equity will interfere at the suit of an individual to restrain a public nuisance are necessarily rare. But this power of the courts is well established, and an injunction will be granted where the plaintiff would suffer injury from the nuisance. *Hamilton v. Whitridge*, 11 Md. 128. But this remedy, like an action for damages from a public nuisance, must be founded on special damage. *O'Brien v. Norwich Co.*, 17 Conn. 372.

⁵⁶ 2 Saund. 174.

⁵⁷ *Attorney General v. Doughty*, 2 Ves. Ch. 453. Injunctions against the creation and continuance of nuisances are subject to the same rules as other injunctions. They are not granted where the legal right is doubtful, or where the party has a complete remedy at law, or where an injunction will cause much greater injury than the nuisance. After the right is established by an action an injunction will be granted against the continuance. This subject is more fully treated under the head of equity.

⁵⁸ *Mayor v. Brooke*, 7 Q. B. 377; *Brown v. Perkins*, 12 Gray, Mass. 89.

that there is no decided case which sanctions the abatement of nuisances from omission, except that of cutting the branches of trees which overhang the soil or way of the party injured.⁵⁹ This distinction seems, however, more metaphysical than real.

2390. The right of abatement is not influenced by the amount of injury caused by the nuisance, nor by the injury caused in abating it. The abator is justified in taking such steps as are necessary to remove it, provided he does no more. He need not observe particular care, so as to prevent injury to the materials. Though a gate illegally fastened across a way may be opened without cutting it, yet the cutting it down would be lawful; and he may, if necessary, enter upon the land of the wrong doer.⁶⁰

2391. If the abator does any more damage than is necessary he becomes a trespasser. In passing over the land of another he must cause as little injury as possible, and he must remove only such things as constitute the nuisance. If a dam is a nuisance, by being built too high, he must remove only the top;⁶¹ he cannot remove the materials farther than is necessary, nor convert them to his own use, and he must not place them where they constitute a greater nuisance.

2392. By the ancient English law there were two remedies intended to secure the removal of a nuisance, but they have both gone a good deal out of use, though they are not absolutely obsolete. These two actions could only be brought by the tenant of the freehold, and by a lessee for years, whose only remedy is an action upon the case.

2393. An assize of nuisance is a writ in which it is stated that the injured party complains of some particular act done, *ad nocumentum liberi tenementi sui*; it commands the sheriff to summon an assize, that is, a jury, and view the premises, and have them at the next commission of assizes, that justice may be done therein; and if the assize is found for the plaintiff, he shall have judgment of two things: 1, that the nuisance be abated; and, 2, to recover damages.⁶²

2394. Before the statute of Westm. 2, 13 Edw. 1, c. 24, no action could be brought against the alienee of the tenements whereon the nuisance was situated. Before the passage of this statute the party injured, upon the alienation of the land on which the nuisance was set up, was driven to his writ, *quod permittat prosternare*, which is in the nature of a writ of right. This writ commands the defendant to permit the plaintiff to abate the nuisance complained of, and unless he so permit, summons him to appear and show cause why he will not. These two actions have become almost obsolete.

2395. The usual remedy for a private nuisance is by action on the case for damages. In this action the party injured recovers damages only for the injury actually sustained at the beginning of the suit, not for any permanent or prospective injury;⁶³ and he cannot in this action compel the removal of the nuisance, though under some of the modern codes of practice these two remedies may be joined. As the continuance of a nuisance constitutes a new injury, successive actions may be brought until it is removed. It is usually held that one who continues a nuisance created by another is liable only after a notification to remove it;⁶⁴ but this rule is not universal, and some cases hold that no

⁵⁹ *Lonsdale v. Nelson*, 2 Barnw. & C. 311.

⁶⁰ *Colburn v. Richards*, 13 Mass. 420.

⁶¹ *Heath v. Williams*, 25 Me. 209; *Moffit v. Brewer*, 1 Greene, Iowa, 348; *Elliot v. Fitchburg R. R.*, 10 Cush. Mass. 191.

⁶² 9 Coke, 55; 3 Sharswood, Blackst. Comm. 221.

⁶³ *Thayer v. Brooks*, 17 Ohio, 489.

⁶⁴ *Crommelin v. Cox*, 30 Ala. N. s. 318; *McDonough v. Gilman*, 3 All. Mass. 264; *Caldwell v. Gale*, 11 Mich. 77.

such notification is necessary,⁶⁵ and to be available the want of notice must be specially set up in defence.⁶⁶

When the consequences of a nuisance will continue, so as to be injurious to a reversioner or remainder-man, he may maintain an action for the damage caused to his interest.

As to the party who is liable for damages, as a general rule it is the person who has made the erection, or done or committed the act which constitutes the nuisance, who is in general obliged to respond in damages.⁶⁷ In the case of a lease, the lessor is not in general bound to remove nuisances, unless he has covenanted to do so, or otherwise unless caused by his own act.⁶⁸ As before stated, a tenant for years is not liable for the mere keeping a nuisance as it used to be before the commencement of his tenancy;⁶⁹ but where he has created it, or, in certain cases, maintained it, the tenant will be liable and the owner will not be.⁷⁰ And where the premises are in such a state when leased that by ordinary use for their intended purpose a nuisance is made to exist, the lessor will be liable.⁷¹

⁶⁵ *Morris Co. v. Ryerson*, 3 Dutch. N. J. 457.

⁶⁶ *Brown v. Cayuga R. R.*, 12 N. Y. 486; *Snow v. Cowles*, 25 N. H. 275.

⁶⁷ *Brown v. Ilius*, 27 Conn. 84; *Pennoyer v. Saginaw*, 8 Mich. 534; *Brown v. Watson*, 47 Me. 151.

⁶⁸ 1 Washburn, Real Prop. *347; *Morse v. Maddox*, 17 Mo. 569; *Post v. Wetter*, 2 E. D. Smith, 248; *Kramer v. Cook*, 7 Gray, Mass. 553; *Libbey v. Tolford*, 48 Me. 316. See *Alston v. Grant*, 24 Eng. L. & Eq. 122.

⁶⁹ *McDonough v. Gilman*, 3 All. Mass. 264.

⁷⁰ *Saltonstall v. Banker*, 8 Gray, Mass. 195; *Owings v. Jones*, 9 Md. 108.

⁷¹ *Packard v. Collins*, 23 Barb. N. Y. 444; *Owings v. Jones*, 9 Md. 108.

CHAPTER VII.

WASTE.

- 2396. Injuries to the reversion or remainder.
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- 2410–2413. The remedy for waste.
 - 2411. Injunction to prevent waste.
 - 2412. Writ of estrepement.
 - 2413. Remedy by action.

2396. The principal *injury affecting remainders and reversions* is that committed upon or to the buildings or land, during a tenancy for life or years, by waste.

2397. *Waste* is the spoil or destruction in houses, gardens, trees, or other corporeal hereditaments, to the disherison of him who has the reversion or remainder in fee simple or fee tail, that is, whatever does a lasting damage to the freehold or inheritance, and tends to the permanent loss of the owner in fee, or to destroy or lessen the value of the inheritance.¹ This general rule holds true in all cases, but of course no more particular rule can be laid down, as many acts injure the inheritance in certain circumstances, but not in others, as cutting timber, which is waste in England, but may often be good husbandry in this country.

Waste is of several kinds; it may be committed by persons standing in a particular situation to the owner of the land, and for this the law gives a remedy.

2398. Waste is either active or wilful, usually termed voluntary waste, or it arises from mere negligence, which is called permissive waste.

2399. *Voluntary waste* is committed by injuries to houses; to cultivated lands; to wild lands; or to mines, quarries, and the like.

2400. It is committed in *houses* by removing wainscots, floors, benches, furnaces, window-glass, windows, doors, shelves, and other things once fixed to the freehold, whether the same have been built by the owner of the land himself or by his tenant. This must however be understood with this qualifica-

¹ *McGregor v. Brown*, 10 N. Y. 117; *Proffitt v. Henderson*, 29 Mo. 325.

tion, that when fixtures have been erected by the tenant for the purpose of trade, he is at liberty to take them away.³

As to the manner of committing it, it may be observed that it is waste not only to pull down houses, or parts of them, but also to change their forms; as, if a tenant pull down a house and erect a new one in its place, whether it be larger or smaller than the first;³ but this seems not well settled, and it is probable that if the lessee were to build a new and valuable house, which would benefit the estate, or take down an old house of not much value and build a larger and better in its place, it would not be considered waste.⁴ It is waste to convert a parlor into a stable, or a grist-mill into a fulling-mill, or to turn two rooms into one.⁵ The building of a house where there was none before is said to be a waste,⁶ though this is doubted, and the pulling it down after it is built is waste.⁷

2401. Waste is frequently and easily committed on *cultivated fields, orchards, gardens, meadows*, and the like. It is waste to convert arable to woodland, and the contrary; or meadow to arable; or meadow to orchard;⁸ and the impoverishment of fields by constant tillage from year to year was held to be waste, and so was the removal of bog grass from a farm where it had usually been foddered upon.⁹ Cutting down fruit trees, although planted by the tenant himself, is waste;¹⁰ and it was held to be waste for an outgoing tenant of garden ground to plough up strawberry beds which he had bought of a former tenant when he entered.¹¹ This was pure mischief, which did the tenant no good; and although the owner of the land could not be made to pay for such improvements of his estate, as in some cases it might cramp him very much, yet in *foro conscientiæ* he ought not to ask that which was a loss to the tenant and a gain to himself for nothing.

When by the terms of his lease the tenant is entitled to cut down trees, he is restrained nevertheless from cutting down ornamental trees, or those planted for shelter,¹² or to exclude objects from sight,¹³ or fruit trees, or even timber trees, or those used in building, if a sufficiency of other trees can be had; but of course this must be so understood that when timber is required for repairs of the buildings, fences, hedges, gates, and the like, on the leased premises, the tenant may cut down timber trees for that purpose.¹⁴

2402. The doctrine of waste is somewhat different in this country, as it relates to cutting down timber trees particularly, from what it is in England; it is adapted to our circumstances. In the United States there is an excess of woodland, in England a scarcity; what would be waste there might in some places be a benefit here. In most of the states the law has applied itself to our situation, and many of those acts which in England would be accounted waste are not so considered here.¹⁵ When wild and uncultivated land, wholly covered with wood and timber, is leased, the lessee may fell a part of the wood and timber so as to fit the land for cultivation without being liable to waste, but he cannot cut down the whole so as permanently to injure the inheritance. And

³ Before, 1584.

⁴ 2 Rolle, Abr. 815, l. 38; Bacon, Abr. *Waste*, C. See *Beers v. St. John*, 16 Conn. 329; *Clemence v. Steere*, 1 R. I. 272.

⁵ Eden, Inj. 187.

⁶ Coke, Litt. 53, a. But see *Pyncheon v. Stearns*, 11 Metc. Mass. 304; *Sarles v. Sarles*, 3 Sandf. Ch. N. Y. 601; *Winship v. Pitt*, 3 Paige, Ch. N. Y. 259.

⁷ Comyn, Dig. *Waste*, D. 2.

⁸ *Sarles v. Sarles*, 3 Sandf. Ch. N. Y. 601.

⁹ *Wetherell v. Howells*, 1 Campb. 227.

¹⁰ *P. v. Bell*, 6 Ves. Ch. 419.

¹¹ *Day v. Merry*, 6 Ves. Ch. 375.

¹² *Hastings v. Crunkleton*, 3 Yeates, Penn. 261.

⁸ 2 Rolle, Abr. 815, l. 37.

⁶ Coke, Litt. 53, b.

¹⁰ 2 Rolle, Abr. 817, l. 30.

¹⁴ Coke, Litt. 53, b.

to what extent the wood and timber on such land may be cut down without waste is a question for the jury under the direction of the court.¹⁶

The tenant may of course, in the absence of all restrictions in the lease, cut down trees for the reparation of the houses, fences, hedges, stiles, gates, and the like, and for making and repairing all instruments of husbandry requisite for the cultivation of the land, as ploughs, carts, harrows, rakes, forks, etc.¹⁷ But he must use in the first place such dead timber as may answer the purpose.¹⁸

2403. It is a general rule that when land is leased with the mines, and there are open mines of metal or coal, or pits of gravel, lime, clay, brick, earth, stone, and the like, the tenant may dig out of such mines or pits,¹⁹ unless restrained by his lease.²⁰ But he cannot open any new mines or pits without being guilty of waste.²¹ In either case, however, the right may be qualified by the agreement of the parties; a tenant may be authorized to open new mines without committing waste, or he may be restricted in the use of such as are already open.

It is said that the tenant may take as much coal, iron, and stone as is necessary for his own use, without selling;²² and he may dig for gravel or clay for the reparation of the houses, though the quarries are not open.²³

2404. *Permissive waste* in houses is punishable where the tenant is expressly bound to repair, or when he is so obliged on an implied covenant.²⁴ In the absence of all agreements between the parties, the tenant is always required to do the necessary repairs to prevent the destruction of the property; he is therefore bound to put in all windows or doors that have been broken by him so as to prevent any decay of the premises, but he is not obliged to put a new roof on an old worn-out house.²⁵ The neglect to make such repairs, or those for which he has expressly covenanted, is *permissive waste*.²⁶

2405. With regard to the persons who may commit waste, and how far each class shall be held responsible, it may be said there is some confusion. These classes will be separately examined.

2406. *Tenants for life*, unless holding without impeachment of waste, and of course punishable for waste, are liable for any actual and wilful waste; as, by cutting trees otherwise than for repairs, or for house-bote, hay-bote, plough-bote, or fire-bote.²⁷

But although a tenant for life may hold without impeachment of waste, yet he is not at liberty wantonly to destroy the estate; he will not be allowed to cut timber serving for shelter or ornament, or fruit trees, if any other of a proper growth be fit to be cut. A tenant for years, without impeachment of waste, is in the situation of a tenant for life with such a clause in his lease, and they will both be restrained and enjoined in equity from committing malicious waste.²⁸ Equity will not allow a tenant for years, with such a clause, to fell timber just before the expiration of his lease,²⁹ nor to dig and carry away the soil to make bricks.³⁰

¹⁶ Jackson v. Brownson, 7 Johns. N. Y. 227.

¹⁷ Coke, Litt. 53, b; Wood, Inst. 344.

¹⁸ Comyn, Dig. Waste, D, 5; Fitzherbert, Nat. Brev. 59, M.

¹⁹ Comyn, Dig. Waste, D, 4; 2 Rolle, Abr. 816; Neel v. Neel, 19 Penn. St. 324.

²⁰ 1 Cruise, Dig. 132; 1 Chitty, Pract. 184; 5 Coke, 12.

²¹ Coke, Litt. 53, b; Sandoz's Case, 5 Coke, 12.

²² 2 Rolle, Abr. 816. See Lord Courtownard, 1 Schoales & L. Ch. Ir. 8.

²³ Coke, Litt. 53, b.

²⁴ Ferguson v. —, 2 Esp. 590.

²⁵ Coke, Litt. 53, b; Brooke, Abr. Waste, 130; Hob. 296.

²⁶ Dane, Abr. c. 78, a. 14, § 7; Bacon, Abr. Waste, N; Rolt v. Somervill, 2 Eq. Cas. Ab. tit. Waste, A, pl. 8.

²⁷ Abraham v. Bubb, 1 Cruise, Dig. 258.

²⁸ Bishop of London v. Webb, 1 P. Will. Ch. 527.

Two English statutes made provision for the punishment of waste committed by any tenant for life or for years; the statute of Marlbridge, 52 Hen. III, c. 24, authorized the action of waste, and gave full damages; and the statute of Gloucester, 6 Edw. I, c. 5, extended the penalty to a forfeiture of the place wasted and treble damages. The principles of these statutes have been re-enacted or incorporated, with modifications, in the laws of many states of the Union.

The liability for waste extends to all tenants for life, whether the tenancy be created by law or by the acts of the parties.³¹ Thus it extends to tenants in dower,³² tenants by the curtesy,³³ and tenant by devise.³⁴ If a tenant in dower assign her interest, she is liable to the heir for waste committed by her assignee on account of the privity between them,³⁵ but if the heir also assigns the reversion, then the grantee of the heir may bring an action against her assignee, but not against the tenant in dower, for the privity is gone.³⁶

2407. Tenants for a term of years are liable for wilful waste, whether committed by themselves or a stranger. When such tenants hold under a lease or express demise, they are not liable for permissive waste in buildings, unless they have covenanted to repair.³⁷

In the absence of all express covenants there is always an implied covenant on the part of the lessee to use a farm in a husband-like manner, and not to exhaust the soil by neglectful or improper tillage.³⁸

2408. Like a tenant for a term of years, a tenant from year to year is bound not to commit waste, such as ploughing up strawberry beds still in bearing, and this although he paid for them at a valuation, having bought them from a former tenant when he entered.³⁹

As to permissive waste, such a tenant does not appear to be liable for it, for he is not bound to make or do what are called tenant's repairs, that is, to keep the premises wind and water tight, unless there is an agreement or covenant so to do.⁴⁰ But a tenant from year to year, or for a less period than a year, like any other tenant, is bound by his implied agreement to use the premises in a tenant-like manner, or, in case of lands, in a husband-like manner, and any violation of this implied covenant will be considered as waste.⁴¹

If a tenant at will commits waste, it is a determination of the tenancy, and the reversioner may maintain trespass *quare clausum*.⁴²

2409. Tenants for life and tenants by the curtesy and in dower, or for years, are answerable for waste committed by a stranger to the remainder-man or reversioner. As a general rule, unless there is a special agreement to the contrary, the tenant is responsible to the reversioner for all injuries, amounting to waste,

³¹ The liability of tenants holding by act of law existed at common law; that of tenants by contract did not exist until the statute of Marlbridge, 52 Hen. III, c. 24.

³² Parker v. Chambliss, 12 Ga. 235. As a corollary to this it has been held that a widow is not dowable of wild lands, as she could derive no advantage from them except by committing waste, and thereby forfeiting them. Conner v. Shepherd, 15 Mass. 164. The rule is, however, different in the other states.

³³ Morgan v. Larned, 10 Metc. Mass. 50; Davis v. Gilliam, 5 Ired. Eq. No. C. 308.

³⁴ Hamden v. Rice, 24 Conn. 350.

³⁵ Comyn, Dig. Waste, C, 4; Bacon, Abr. Waste, H.

³⁶ Foot v. Dickinson, 2 Metc. Mass. 611; Coke, Litt. 54, a; Bates v. Shræder, 13 Johns. N. Y. 263; Park, Dower, 359, 360.

³⁷ Herne v. Benbow, 4 Taunt. 764. See 1 Coke, Litt. 644; 5 Coke, 13, b; 2 Saund. 522, a, note 1.

³⁸ Powley v. Walker, 5 Term, 373.

³⁹ Wetherell v. Howells, 1 Campb. 227.

⁴⁰ 4 Taunt. 764; Jones v. Hill, J. B. Moore, 100; 1 Chitty, Pract. 390.

⁴¹ Powley v. Walker, 5 Term, 373; Legh v. Hewitt, 4 East, 154; but see 2 Barnew. & C. 273.

⁴² Daniels v. Pond, 21 Pick. Mass. 367; Suffern v. Townsend, 9 Johns. N. Y. 35.

done to the premises during the term, by whomsoever they may have been committed, with the exceptions of the acts of God, or inevitable accidents, those of a public enemy, or of the reversioner himself. The reason appears to be that the landlord not being on the spot to protect the property against strangers, the law has cast that duty on the tenant, who is presumed to be able to do so.⁴³

But although the tenant is liable for waste committed by a trespasser, yet, when the injury is done to the reversionary estate, the reversioner may maintain an action on the case, in the nature of waste against the strange trespasser;⁴⁴ as, where timber is cut down by a stranger while the property is in the possession of a tenant for years; trespass *vi et armis* will lie against a third person for carrying it away after it has been cut down.⁴⁵

2410. There are three remedies for waste: by injunction; by estrepement; and by action. The first two are preventive, the last is compensatory.

2411. A bill in equity to stay waste, either threatened or which the wrong doer is in the act of committing, is one of the most efficacious remedies. When the case is fully made out an injunction will be granted, and this will completely prevent the commission of future waste. It is granted to restrain permissive as well as voluntary waste,⁴⁶ and whether an action at law has been commenced or not.⁴⁷

In general, an injunction will not be granted to restrain a tenant from committing waste where he holds the land "without impeachment of waste." But although the tenant for life, without impeachment of waste, is entitled by virtue of his tenure to do waste which produces an interest to him, yet, in equity, when this extensive power is abused, by making an unconscionable use of it, the courts will restrain it. Tenant for life, without impeachment of waste, and tenant in tail, after possibility of issue extinct, may be restrained from committing wilful, destructive, malicious, extravagant, or humorous waste.⁴⁸

2412. The writ of *estrepement* lay at common law to prevent a party in possession from committing waste on an estate the title to which was disputed, after a judgment obtained in a real action, and before possession was delivered by the sheriff.

But as waste might be committed in some cases pending the suit, the statute of Gloucester gave another writ of estrepement *pendente placito*, commanding the sheriff firmly to inhibit the tenant, "*ne faciat vastum vel estrepementum pendente placito dicto indiscusso.*"

By virtue of either of these writs the sheriff was authorized to resist those who committed waste or offered to do so, and to use sufficient force for the purpose.⁴⁹

In Pennsylvania a similar writ may be issued by virtue of an act of assembly. The more efficacious remedy to prevent waste by injunction has rendered this writ nearly obsolete.⁵⁰

⁴³ See *White v. Wagner*, 4 Harr. & J. Md. 373; *Fay v. Brewer*, 3 Pick. Mass. 203; *Elliott v. Smith*, 2 N. H. 430; *Randall v. Cleaveland*, 6 Conn. 328.

⁴⁴ 6 Conn. 328; 2 N. H. 430. But a technical action of waste will not lie in such case. *Wilford v. Rose*, 2 Root, Conn. 20.

⁴⁵ 2 Chitt. Bail. 636.

⁴⁶ *Caldwell v. Baylis*, 2 Mer. Ch. 408; 2 Story, Eq. Jur. § 917; 1 Fonblanque, Eq. B. 1, c. 1, § 5, note (p); *Eden*, Inj. 199.

⁴⁷ *Kane v. Vanderburgh*, 1 Johns. Ch. N. Y. 11.

⁴⁸ *Vane v. Lord Barnard*, Prec. Chanc. 454; *Gilb. Eq. 127*; 1 Salk. 161; 2 Vern. Ch. 738; *Williams v. Day*, 2 Ch. Cas. 32; *Cooke v. Whaley*, 1 Eq. Cas. Abr. 400; *Anon.*, 1 Freem. 273. The action of waste lies only in favor of the immediate reversioner, but an injunction will be granted on the application of the owner of the fee notwithstanding an intermediate reversion. *Denny v. Brunson*, 29 Penn. St. 382.

⁴⁹ *Sharswood*, Blackst. Comm. 225, 226. See 10 Viner, Abr. 497; *Woodfall*, L. & T. 447; *Archb. Civ. Pl.* 17.

⁵⁰ Beyond, 3796.

2413. The ancient writ of waste, which might have been issued at common law and by virtue of several statutes, has been superseded in modern practice. It is usual to bring an action on the case in the nature of waste, instead of the action of waste, as well for that which is permissive as for the voluntary.

In an action on the case in the nature of waste, the plaintiff recovers only for the waste; still, this action has advantages over the ancient remedy, that it may be brought by the reversioner or remainder-man for life or years as well as in fee or fee tail, and the plaintiff is entitled to costs in this action, which he cannot have in an action of waste.⁵¹

The plaintiff in this action can only recover the amount of damage sustained by his particular estate.⁵²

⁵¹ See Dane, Abr. c. 78, a, 15. By the statute of Gloucester the reversioner in an action of waste recovered treble damages and the thing wasted. Different opinions have been held as to the force of this statute in this country, but the law is now universally settled by statute. The recovery of the thing wasted, with damages, is allowed in Massachusetts, Maine, New York, New Jersey, North Carolina, Delaware, Missouri, Kentucky, Rhode Island, and Illinois. In Minnesota, Oregon, Iowa, and Ohio, the place is forfeited in certain cases. In the other states damages only are recovered. See 1 Washburn, Real Prop. 2d ed. 122, note.

⁵² Hamden v. Rice, 24 Conn. 350.



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